Broadcasting Licenses: Ownership Rights and the Spectrum Rationalization Challenge

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Abstract

This paper examines the looming showdown between television broadcasters and the FCC in light of the FCC's plan to reallocate underutilized broadcast spectrum for significantly higher value mobile broadband use. The government must do so in an economically and legally efficient manner, balancing the interests of society as a whole against those of the politically powerful broadcasters in light of the governmental time and resources required to negotiate and/or litigate with the broadcasters. The government has indicated it seeks a process that is voluntary on the part of the broadcasters. Nonetheless, the broadcasters' current opposition to the spectrum reallocation plan raises the question of whether, and to what extent, the broadcasters' ultimately possess rights to license the spectrum and what type of compensation, if any, they would be owed if the FCC takes their spectrum licenses involuntarily. The answer to this question sets the boundaries of the broadcasters' legal leverage in the negotiation. This paper finds that, from a strictly legal perspective, the broadcasters have a very weak claim to property rights over their spectrum licenses. Thus, the broadcasters are not legally entitled to any compensation if their licenses are simply allowed to expire. Moreover, the broadcasters have no legal claim to any of the new value associated with the use of the frequency for higher value mobile broadband services. The broadcasters may, however, be entitled to due process before the spectrum can be taken from them and are almost certainly entitled to seek judicial review of any adverse FCC decisions. This could result in lengthy rulemaking procedures, adjudication hearings and judicial appeals that could delay any reassignment of the spectrum. For practical political reasons, including maximizing revenue from future spectrum auctions, the most expedient way for the government to reacquisition spectrum rights would be for the government to incentive the broadcasters to voluntarily participate in a reallocation plan by providing compensation beyond the level that that is legally required.

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Table of Contents

Abstract i

Table of Contents ii

Executive Summary iv

I. Introduction 1

II. Claims that FCC Licenses Confer Property Rights are Weak 4

A. Text of the Communications Act of 1934 Denies Property Rights; 1996 Amendment does not Alter 1934 Act's Denial of Property Rights 5

B. Legislative History of the 1934 Act Does Not Imply Property Rights 7

C. Legislative History of the 1996 Amendment Does not Imply Property Rights 9

D. Practical Application of the 1934 Act and 1996 Amendment May Imply Some Property Rights 13

E. Bankruptcy Precedent does not Support Spectrum Property Rights. 18

F. Tension between 1934 Act and 1996 Amendment Favors 1934 Act's Clear Denial of Property Rights 20

III. Analogous Cases Regarding Ranchers' Grazing Permits Suggest No Property Rights for Spectrum License Holders 21

A. Grazing Permits, Like Spectrum Licenses, Often Mimic Property Interests 22

B. Courts Have Concluded Grazing Permits Are Not Property 23

C. Any Property Rights Would Nevertheless Exclude Higher Value Broadband Use 27

IV. Government Could Short-Circuit Any Alleged Property Interest by Amending the Communications Act 29

V. Principles of Traditional Property Law Provide Little Support for Any Broadcaster Claims to Property Rights 33

A. Elements of Property 34

B. Easement Rights for Broadcasters? 35

1. Easement by Estoppel May Apply 35

2. Broadcasters Are Unlikely To Successfully Claim Easements Implied from a Prior Use 40

3. Easement by Prescription (Adverse Possession) is Unlikely 41

C. Purchase vs. Assignment of Licenses Should Not Matter 43

D. As a Whole, Broadcasters' Argument for Property Rights Based On Traditional Property Law is Very Weak 45

VI. Broadcasters May Have Due Process Rights 45

A. Congress Can Help to Simplify the FCC's Process 46

B. Absent New Legislation, at Least One Rulemaking Process Will be Necessary 48

1. Decision to Not Renew Broadcasting Licenses Likely Needs Rulemaking 49

2. Rulemaking Still Needed to Reallocate Spectrum 52

C. Elements of Adjudication Due Process to be Decided 53

1. Balancing Test for Extent of Due Process Elements 53

2. Application of Balancing Test to Broadcasters 54

3. Likely Requirement for Broadcasters' Due Process in Any Adjudication Process 55

VII. Broadcasters Likely Have Right to Judicial Review of Adverse Decisions 58
A. Attacking Congressional Legislation 59
B. Routes for Broadcasters to Attack FCC Rulemaking 59
1. Did the FCC have the Authority to Make the Rule? 60
2. Was the Law clear? 60
3. Was the Rule Permissible? 61
C. Routes for Attacking an Adjudication 62
VIII. The Need for a Clear Policy 63
IX. Conclusion – The Government Needs to Finagle this Round 64

Executive Summary

The FCC's desire to reallocate large amounts of spectrum from television broadcasting use to mobile broadband use to accommodate the goals of the National Broadband Initiative has portended a major showdown between the FCC and the television broadcasters. The major broadcasting associations have opposed the reallocation, and armies of lawyers and lobbyists are advocating behind the scenes for the broadcasters with respect to any FCC decision. One of the most significant issues of this battle relates to the rights the broadcasters have to remain on their spectrum. This question translates into whether and to what extent current spectrum license holders possess property rights in their spectrum or merely control temporary rights to use the spectrum and sets the ultimate parameters within which the broadcasters have legal leverage over the U.S. government to accommodate the demands.

The largest block of potentially available spectrum that is economically and technically viable to reallocate to mobile broadband use is the 294 Mhz allocated to broadcast television. Regulators find the potential reallocation of broadcast television spectrum appealing insofar as this spectrum is relatively inefficiently used. Broadcasters use only 17% of the 294 Mhz of nationwide television broadcasting spectrum that is dedicated to broadcast television. Moreover, approximately 90% of U.S. households do not receive their broadcast television programming through the broadcast spectrum, but instead from cable, satellite or an increasing variety of Internet-based services.

It would make economic sense for the government to put this largely unused spectrum to higher-value uses, particularly for mobile data applications. The broadcasters have no legal rights to the higher value mobile broadband use. The terms of the broadcast spectrum licenses limit the use of the spectrum to local television broadcast applications and some ancillary uses, and also

imposes other limitations and obligations. These restrictions therefore prevent broadcasters from simply using the spectrum themselves for higher value mobile applications. Moreover, the government should not simply give the broadcasters additional rights to use the spectrum for mobile data. Such action would be an enormous and fiscally irresponsible giveaway to a powerful industry during a time when budget deficits are placing significant pressure on the U.S. Treasury. Rather, if the government auctioned this spectrum to mobile wireless providers, it could generate substantial revenue and further the public interest by ensuring widely available mobile broadband.

Courts are unlikely to find that the television broadcasters have property rights to the spectrum they use, even for the lower-value television broadcast use they currently license. The FCC grants spectrum licenses to companies for periods of limited duration, usually 5-7 years, with some expectation of renewal, assuming the license holder complies with the terms of the license. The Communications Act of 1934 is clear that spectrum licenses do not confer permanent property rights. Over time, however, the broadcasters' renewal expectations have become stronger due to FCC actions, judicial precedents and regulatory changes. Broadcasters and their investors have taken significant actions based on the assumption that the licenses will be renewed, including making large investments in their broadcast businesses and regularly selling licenses to third parties for considerable amounts. Nevertheless, broadcasters are ultimately unlikely to be able to assert legally protected property interests in their licenses. Supreme Court precedent dealing with regulatory changes and an analogous line of cases dealing with grazing permits demonstrates that any broadcasters' claims for property rights are weak. The broadcasters' strongest argument would be one of promissory estoppel based on their recent investment in digital transmission equipment as part of the digital television conversion in 2009

and based on renewal expectations that were written into the 1996 Amendment to the Telecom Act. Yet, even these arguments would likely fall short under prevailing law.

Despite their weak property rights claim, the broadcasters have significant due process rights that could make the government's reacquisition and reallocation of their spectrum highly time and resource consuming. Absent a change in legislation, the FCC would have to engage in a rule making process and possibly hold individual adjudications for each license it seeks to revoke or not renew. In addition, each television broadcaster that receives an unfavorable decision will have the option of seeking judicial review. These procedures would significantly drain government resources and tremendously delay the spectrum reallocation process. In recognition of the vast political power of the broadcasters and the government's desire to avoid protracted litigation and maximize revenue from upcoming spectrum auctions, the more practical and expedient option for the government would be to agree to not contest the existence of the broadcasters' property rights. Rather, the government might seek to shift the debate from whether broadcasters possess property rights in the spectrum to the type and amount of compensation to be awarded to the broadcasters. This may be the most efficient way to clear the spectrum and maximize the value of future spectrum auctions while satisfying the interests of the broadcasters, the U.S. Treasury, and society as a whole.

I. Introduction

Demand for mobile broadband applications is soaring, and the FCC, which allocates spectrum for specific applications, believes that more spectrum should be allocated for this purpose.[2] This conclusion is widely supported by industry observers. As part of the recently released National Broadband Plan, the FCC is seeking to reallocate 300 Mhz of spectrum over the next five years, and 500 Mhz by 2020, to mobile broadband applications. Some industry observers advocate even larger amounts.[3] Many economists point to a multiplier effect where the social and economic benefits of broadband deployment are many times the value of the project itself.[4] Nonetheless, the television broadcasting industry is fiercely resisting this move. Much of the battle has been taking place via lobbyists and lawyers behinds closed doors. However as the FCC moves towards its objective, the battle is now spilling into the public forum.[5] Major broadcasting associations have repeatedly voiced opposition to the government's planned spectrum reallocation.[6]

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[2] David Gardner, *FCC Chair Cites 'Spectrum Crisis'*, INFORMATION WEEK (Oct. 7, 2009), http://www.informationweek. com/news/government/mobile/showArticle. jhtml?articleID=220301552.

[3] CTIA paper suggested 800 Mhz is needed. *See Comments of CTIA – The Wireless Association NBP Public Notice #6,* CTIA.ORG, at 2 (Nov. 13, 2009), http://files.ctia.org/pdf/filings/091023_CTIA_Comments_NBP_PN.pdf.

[4] Hazlett, Thomas W. and Munoz, Roberto E., *A Welfare Analysis of Spectrum Allocation Policies*, GEORGE MASON LAW & ECONOMICS RESEARCH PAPER NO. 06-28, Jan. 19, 2008, *available at* http://ssrn.com/abstract=908717 .

[5] Joe Flint, *FCC Chairman Genachowski and Top Lobbyist for Broadcasters Clash Over the Need for a Spectrum Auction,* LATIMES.COM (Apr. 12, 2011, 11:26 AM), http://latimesblogs.latimes.com/entertainmentnewsbuzz/2011/04/fcc-chairman-genachowski-and-nab-ceo-smith-trade-punches-over-spectrum.html

[6] "NAB [National Association of Broadcasters] President Gordon Smith made clear that broadcasters are ready to fight proposals they believe will undermine their industry's core business. 'We're in full battle mode to protect broadcasters from being forced to give up spectrum in any way that is involuntary.'" Juliana Gruenwald, *FCC Chairman Warns Against Delay in Spectrum Reallocation,* NEXTGOV.COM (Apr. 13, 2011), http://www.nextgov.com/nextgov/ng_20110413_5477.php.

The National Broadband Plan warns that if spectrum availability issues are not addressed, our nation will face "higher prices, poor service quality, an inability for the U.S. to compete internationally, depressed demand and, ultimately, a drag on innovation."[7] One of the largest challenges in accomplishing spectrum reallocation is to determine how to divert spectrum from current applications and how (or whether) to compensate current users of that spectrum.

Numerous studies have documented the current inefficient allocation of electromagnetic spectrum in the United States. Nationwide, only about 17% of the available channel capacity in the current allocation of 294 Mhz of VHF[8] and UHF[9] spectrum to television broadcasters[10,11] is used for television broadcasting.[12] Moreover, over 90% of consumers receive their broadcast television programming via cable or satellite systems, leaving less than 10% of viewers watching over the air television broadcasts. Thus, 294 Mhz of valuable dedicated spectrum is being significantly

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[7] *National Broadband Plan: Chapter 5 - Spectrum,* BROADBAND.GOV, at 2-3, www.broadband. gov/plan/5-spectrum (last visited May 25, 2011) [hereinafter *Spectrum*].

[8] VHF television broadcasting frequencies: 54-72 Mhz (channels 2-4); 77-88 Mhz (channels 5&6); 174-216 Mhz(channels 7-13).

[9] UHF television broadcasting frequencies: 470-698 Mhz (channels 14-69; except channel 37 between 608 and 614Mhz which is reserved for radio astronomy use). Prior to June 2009, when television broadcasters converted to digital broadcasting and the channels were "repacked," the UHF band extended from 608 to 800 Mhz. The frequencies 698 to 800 were used for channels 52-69. The 698-800 Mhz spectrum was auctioned in 2008-2009 in an auction dubbed "The 700Mhz Auction" officially known as "Auction 73." Until the 1980s, channels 70 though 83 existed and utilized 806-884 Mhz.

[10] Phil Bellaria, Adam Gerson & Brian Weeks, *Spectrum Analysis: Option for Broadcast Spectrum,* OBI Technical Paper #3, BROADBAND.GOV, at 7 (June, 2010), http://download.broadband.gov/plan/fcc-omnibus-broadband-initiative-(obi)-technical-paper-spectrum-analysis-options-for-broadband-spectrum.pdf (last visited May 22, 2011) [hereinafter *Spectrum Analysis*].

[11] For comparison, the entire AM radio band occupies 1.2 Mhz of spectrum. *See* Robert M. Rast, *The Dawn of Digital Television,* INSIDE SPECTRUM TECHNOLOGY (Oct. 2005), http://spectrum.ieee.org/consumer-electronics/audiovideo/the-dawn-of-digital-tv.

[12] Thomas W. Hazlett, *Unleashing the DTV Band: A Proposal for an Overlay Auction* NBP PUBLIC NOTICE 26, at 5-6 (Dec. 18, 2009) [hereinafter *Hazlett*]. Prof. Hazlett's calculation is 49 channel slots in 210 markets, or 10,290 available channels exist, but only 1750 full power television stations are licensed.

underutilized (just 17% of the available channel capacity is being used by 10% of the population)![13,14]

In order to use spectrum more efficiently, the FCC must determine an appropriate mechanism for reallocating the broadcast spectrum to allow it to be used for higher value applications. In so doing, the FCC must consider the rights of the current spectrum holders and U.S. taxpayers as well as political considerations and implications for long-term government policy.

Given the broadcasters' opposition to planned government reallocation of the spectrum they license, one of the largest issues involved in reallocating the spectrum is to what extent, if any, current license holders have property rights in their spectrum that could impede the government's plans. Given the scarcity of spectrum and the ease of verifying who is using it, many policy makers have argued that spectrum licenses should, as a matter of public policy, be awarded with full explicit property rights to incentivize its most valuable possible use.[15,16] However, the government has not explicitly granted

[13] This unused "white space" is not contiguous and varies significantly by market.

[14] The "Spectrum" paper assumes the over the air subscribers as 14-19% of broadcasters' total audience. *See Spectrum supra* note 7, at n.87. However, the widely accepted figure is close to 10% or less, which also matches Exhibit A of the same report citing a Nelson's estimate. *See id.* at 7.The difference seems to be that while only 10% of regular television viewing is off-air, another 5-7% of cable households use off-air television viewing occasionally – perhaps on a television in a secondary location that is not frequently used and not connected to the cable system.

[15] Thomas W. Merrill engages in an expanded discussion of the conditions that often lead to the creation of property rights for regulated items. *See* Thomas W. Merrill, *Explaining Market Mechanisms,* 2000 ILL. L. REV. 275 (2000).

[16] The idea that private property-based market allocation of spectrum would yield the most efficient allocation for society has been most notably advocated by Ronald Coase in his seminal article. *See* Ronald Coase, *The Federal Communications Commission,* 2 J.L. & ECON. 1 (Oct. 1959) (Oct. 1959) [hereinafter Coase]. This idea is not fully accepted and has been rebutted by others including David Moss and Michael Finn. *See See, e.g.,* David Moss & Michael Finn, *Radio Regulation Revisited: Coase, the FCC, and the Public Interest,* 389 JOURNAL OF POLICY HISTORY 15 (2003).The latter paper argues that auctions do not capture the value of "public interests" such as the value of society having universal communication access or the value of improvements to democracy that occur as a result of greater communication, but only capturevalue that results from profit-making uses.

spectrum holders property rights, and their licenses restrict their use of spectrum to certain applications. If, however, broadcasters are found to have property rights in their spectrum and their licenses are taken, they are entitled to compensation from the government under the "Takings Clause" of the Fifth Amendment. As a result over the uncertainty of the broadcasters' property rights in their spectrum, there is considerable tension over how (or even if) the current television broadcasters should be compensated for their loss of spectrum rights if and when the spectrum is cleared for mobile broadband use. The uncertainty of broadcasters' property rights clearly complicates the process of spectrum reallocation as any compensation for broadcasters potentially increases the costs for the U.S. government dramatically. The uncertainty surrounding license rights also impacts the value bidders are likely to pay the government for spectrum at future auctions. Without certainty over the rights they are acquiring in an FCC license auction, bidders will surely bid less for the licenses than they would if they had such certainty.

II. Claims that FCC Licenses Confer Property Rights are Weak

FCC licenses do not explicitly give television broadcasters property rights in the spectrum they use. The broadcasters' rights to control their spectrum are elaborated in the Communications Act of 1934 ("1934 Act") and in the Amended Telecom Act of 1996. These statutes can be interpreted by analyzing: (1) the text of the statutes; (2) the relevant legislative history; and (3) the way the statutes have been applied in the certain contexts, including bankruptcy cases, in light of public policy considerations . The first two criteria deny the broadcasters any material claim to property rights that would entitle them to

compensation for non-renewal. However, the final criterion suggests that the broadcasters may have some legitimate (and growing) expectation of property rights.

A. Text of the Communications Act of 1934 Denies Property Rights; 1996 Amendment does not Alter 1934 Act's Denial of Property Rights

The text of licenses issued pursuant to the Communications Act of 1934 explicitly denies property rights to license holders. In fact, the Act bans private ownership of radio spectrum:

> It is the purpose of this chapter, among other things, to maintain the control of the United States over all the channels of radio transmission; and to provide the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such licenses shall be construed to create any such right, beyond the terms, conditions and period of the license.[17]

Moreover, the statute requires a waiver of renewal expectation rights in the licenses. Applicants must waive "any claim to the use of any particular frequency or of the electromagnetic spectrum . . . because of previous use of the same."[18] This plain text shows that license holders cannot claim they "own" their spectrum or have a "right" to indefinite renewal. Accordingly, the statutory text explicitly proscribes any claim of property or renewal rights made by spectrum licensees.

The text of the 1996 Amendment to the Communications Act of 1934, however is more ambiguous about the property rights of television broadcasters. Section 204 of the Amendment introduces flexibility for the broadcasters including station ownership limitations and significantly strong suggestions that licenses will be renewed absent violation of terms:

> STANDARDS FOR RENEWAL - If the licensee of a broadcast station

[17] 47 U.S.C. § 301 (2006).

[18] 47 U.S.C. § 304 (2006).

> submits an application to the Commission for renewal of such license, the Commission shall grant the application if it finds, with respect to that station, during the preceding term of its license--
> (A) the station has served the public interest, convenience, and necessity;
> (B) there have been no serious violations by the licensee of this Act or the rules and regulations of the Commission; and
> (C) there have been no other violations by the licensee of this Act or the rules and regulations of the Commission which, taken together, would constitute a pattern of abuse.[19]

The language, "the Commission shall grant" hints at the possibility that the broadcasters have some renewal rights. Moreover, in making renewal decisions, the FCC is not permitted to consider potential for competitors to use the spectrum in a superior manner than the existing licensee:

> COMPETITOR CONSIDERATION PROHIBITED - In making the [license denial renewal decisions], the Commission shall not consider whether the public interest, convenience, and necessity might be served by the grant of a license to a person other than the renewal applicant.[20]

Initially, it may seem these renewal safeguards create a potential opening for broadcasters to argue that they have a right to indefinitely hold their licenses assuming they are in compliance with its terms of use. However, such a reading would be inconsistent with the text of the 1934 Act banning ownership of spectrum. A more coherent reading of Section 204 is that the FCC has discretion to determine if a broadcaster's use of the spectrum is in the public interest, but it cannot use a simple comparison to another applicant to inform this decision. To deny a renewal pursuant to the 1996 Amendment, the FCC must first find that the broadcaster is not using the spectrum in the "public interest, convenience

[19] 47 U.S.C. § 309(k)(1). This languages was added as part of the 1996 Amendment to the Telecommunications Act of 1934, Sec. 204(a)(1).

[20] 47 U.S.C. § 309(k)(4). This language was added part of the 1996 Amendment to the Telecommunications Act of 1934, Sec. 204(k)(4).

and necessity." The FCC must make this determination and deny the renewal before seeking an alternative party to use the spectrum. Accordingly, despite the more flexible wording of the 1996 Amendment, the plain language of the 1934 Act makes clear that broadcasters do not have property interests in their spectrum licenses. This status is unchanged by the 1996 Amendment.

B. Legislative History of the 1934 Act Does Not Imply Property Rights

The legislative history of the 1934 Act also makes clear that Congress considered the airwaves to be national property to be available for the benefit of everyone, and did not intend for licenses to be a transfer of property. The idea of governmental ownership of spectrum for public benefit developed well prior to the 1934 Act. In his seminal book on the legislative history of the Communications Act of 1934, Max Paglin notes that "…the 1923 [National Radio] conference embraced the idea [of public service obligation for broadcasters] by recommending that radio communication be considered a public utility and regulated as such 'in the public interest.'"[21] Paglin explains that the Fourth National Radio Conference in 1925 "endorsed the public interest concept, and recommended legislation incorporating it, though they disowned the recommendation of the first conference that broadcast licenses be treated as public utilities."[22] Moreover, then Secretary of Commerce Herbert Hoover strongly supported the idea of broadcasters as purveyors of public benefit.[23] These conferences led to the Radio Act of 1927, the predecessor to the Communications Act of 1934. The 1927 Act required that licensees

[21] MAX D. PAGLIN, A LEGISLATIVE HISTORY OF THE COMMUNICATIONS ACT OF 1934, at 9 (Oxford Univ. Press 1989, New York) [hereinafter *Legislative History*].

[22] *Legislative History, supra* note 21, at 9-10.

[23] *Legislative History*, *supra* note 21, at 9.

waive claims to any particular spectrum,[24] a feature that was carried into the 1934 Act.[25] The explicit denial of property rights in the Communications Act of 1934 therefore reflected a deeply ingrained legislative belief that the airwaves were public property.

The direct legislative history of the Communications Act of 1934 also supports the conclusion that broadcasting licenses were not intended to convey ownership rights. The June 4, 1934 Conference Report indicates that:

> It is the purpose of this Act, among other things, to maintain the control of the United States over all the channels of interstate and foreign radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by the Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license.[26]

This language, which appeared in the text of the statute, indicates, in no uncertain terms, that the committee did not intend for spectrum licenses to convey property interests. Similarly, one of the committee reports[27] discusses limits on alien ownership and the government's right to commandeer the spectrum for national emergency. These provisions highlight the government's interest in the airwaves. Clearly, the government's perception of broadcast spectrum as a matter of national interest is inconsistent with private ownership by broadcasters.[28]

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[24] *Legislative History, supra* note 21, at 66.

[25] *Legislative History*, *supra* note 21, at 76.

[26] H.R. REP. NO. 1918, at 18 (1934), *reprinted in Legislative History* at 750.

[27] Mr. Rayburn's Committee on Interstate and Foreign Commerce Report, June 1, 1934, p.7.

[28] The view of Glen O. Robinson, a contributor to *Legislative History,* is that the current regulatory scheme (as of *Legislative History's* 1989 publication) is one of "…a limited property rights scheme. Licenses do not in legal theory convey property rights; in economic reality they do." *See Legislative History supra* note 21, at 10. Within this quote, Robinson references FCC v. Sanders Bros. Radio Station, 309 U.S. 470 (1940), noting that "The absence of a property right has not prevented the FCC and courts from recognizing an 'expectancy' of license renewal, an expectancy that as a practical matter is contingent only on good behavior of the licensee." *See Legislative History, supra* note 21, at 10.

C. Legislative History of the 1996 Amendment Does not Imply Property Rights

Interpreting Section 204 of the 1996 Amendment as effectively granting broadcasters indefinite use of the spectrum would be inconsistent with the legislative history and industry environment at the time the Amendment was adopted. Although the formal legislative history of Section 204 is minimal, the House Report characterizes the renewal provision as a procedural change with limited impact.[29] Moreover the history of the FCC's renewal issues with broadcasters in the 30 year prior to the 1996 Amendment makes clear that the renewal assurances in Section 204 were not intended to give broadcasters indefinite rights to their spectrum and thereby limit the ability of the FCC to reacquire spectrum. Rather, Section 204 was designed to deal with the growing issue of renewal objections that created extensive problems for existing licensees. Specifically, incumbent license holders were concerned about the growing number of new competitor applicants for the same licenses who applied to use them for the same purpose (television broadcasting). In particular, some of the licensees were concerned that new applicants having higher priority, due to minority status or other preferences, would supplant their existing spectrum rights when their licenses were up for renewal.

The broadcasters were also concerned about the time and legal costs spent fending off objections to their license renewal by various citizens' groups. By 1966, citizens' groups were permitted to be heard in the FCC license renewal process as a result of

[29] Lili Levi cites the Committee report as saying the legislation: "Does not alter the standard of renewal employed by the Commission and does not jeopardize the ability of the public to participate actively in the renewal process through the use of petitions to deny and informal complaints. Further this section in no way limits the ability of the Commission to act sue sponte in enforcing the Act or Commission rules." Lili Levi, *Not with a Bang, but a Whimper: Broadcast License Renewal and the Telecommunications Act of 1996,* 2 CONN. L. REV. 243, 249 (1996) [hereinafter Levi]; *see also* H.R. REP. ON H.R. 1555 (REPORT NO. 104-204), at 123 (1995), *reprinted in* 1996 U.S.C.C.A.N. 10, 91.

Office of Commc'n of the United Church of Christ v. FCC, 359 F.2d 994 (D.C. Cir 1966). In this case, the Court noted:

> Unless the listeners – the broadcasting consumers – can be heard, there may be no one to bring programming deficiencies or offensive over commercialization to the attention of the Commission in an effective manner. By process of elimination those 'consumers' willing to shoulder the burdensome and costly processes of intervention in a Commission proceeding are likely to be the only ones 'having a sufficient interest' to challenge a renewal application.…On a renewal application the 'campaign pledges' of applicants must be open to comparison with the 'performance in office' aided by a limited number of responsible representatives of the listening pubic when such representatives seek participation.

359 F.2d at 1004-05. After this ruling, it became common for citizens' groups to file competing applications for and/or protests to a broadcaster's license renewal in an attempt to force a "Comparative Hearing Process" whereby the FCC considers the broadcaster's renewal application and compares its merits to the proposed use by the competing applicant(s). These groups would often back an alternative group seeking the broadcaster's license. The incumbent license holders were particularly concerned about challenges from minority owned and operated applicants, which would get preference and theoretically win a tie against a non-minority incumbent in a comparative hearing process analysis. Thus, a common strategy for citizen's groups became backing a minority owned and operated group seeking a broadcaster's license either to force programming or operational changes, or to effect a monetary settlement from the renewal applicant.[30]

While the broadcasters' licenses were almost always ultimately renewed for broadcasters in good standing, the process of dealing with obstacles posed by citizens'

[30] Jarred L. Burden undertakes a detailed analysis of this phenomenon. *See* Jarred L. Burden, *Tying the Victim's Hands: Curbing Citizen Group Abuse of the Broadcasting License Process,* 39 FED. COMM. L.J. 259 (1978) [hereinafter Burden].

groups and competing applicants was expensive from a litigation perspective.[31] These challenges often resulted in the broadcaster paying the competing applicant and/or citizens' group to withdraw their application and/or opposition to renewal, thus incurring significant settlement costs, legal fees and delays in their license renewal.[32] In addition to financial settlements, broadcasters often promised other actions, such as content changes, in exchange for the group's promise to withdraw its complaint or competing application.

Not only were broadcasters displeased with the involvement of citizens' groups and competitor applicants,[33] but also the FCC itself was concerned about their ability to extract settlements from broadcasters in exchange for withdrawing their opposition to a broadcaster's renewal. The FCC saw this process interfering with financial efficiency of the industry.[34] To ameliorate this situation, the FCC issued a policy statement in 1970 giving incumbent license holders preference in comparative renewal cases.[35] The D.C. Circuit Court, however, invalidated the policy statement in *Citizens Commc'ns Center v. FCC*.[36] In *Citizens*, the court sided with a license applicant who complained that giving preference to an existing license holder at renewal was unfair and that comparative

[31] Kurt A. Wimmer engages in a spirited defense of the comparative renewal process including payoffs to competing applicants to withdraw their competing applications. *See* Kurt A Wimmer, *The Future of Minority Advocacy Before the FCC: Using Market Place Rhetoric to Urge Policy Changes*, 41 FED. COMM. J. 133 (April, 1989), [hereinafter Wimmer].

[32] *See* Christopher H. Sterling, *Transformation: The 1996 Act Reshapes Radio,* 58 FED. COMM. L.J. 595 (2006) [hereinafter Sterling].

[33] Christopher H. Sterling engages in a detailed analysis of a particularly protracted comparative renewal process. *See* Christopher H. Sterling, *Billions in Licenses, Million in Fees: Comparative Renewal and the RKO Mess*, 2 GANNETT CTR J. 43 (1988).

[34] FCC document FCC 88-212, *In the Matter of Formulation and Rules Relating to Broadcast Renewal Applicants, Competing Applicants, and Other Participants to the Comparative Renewal Process and to the Prevention of abuses of the Renewal Process*, *Second Further Notice of Inquiry and Notice of Proposed Rule Making in BC,* 3 F.C.R., 5179, 5186-88, 14 (1988)[hereinafter FCC 88-212].

[35] Policy Statement Concerning Comparative Hearings Involving Regular Renewal Applicants, 22 FCC 2d 424 (1970).

[36] Citizen's United Commc'ns v. FCC, 447 F.2d 1201 (D.C. Cir. 1971).

hearings should be unbiased towards competing applicants. Despite this decision, the FCC's opposition to this comparative hearing continued as indicated in a 1988 rulemaking proposal:

> The term 'abuse' is a broad concept but, as used herein, it generally means the use of settlement agreements, petitions to deny, or similar mechanisms by persons to extract concessions from applicants in the form of money or other consideration that are unrelated to the accomplishment of public interest or aims under the Communications Act. Such abuses disserve the public interest because they strike at the overall ends sought to be achieved by the Commission's processes – expeditious and efficient service to the public – by increasing costs to existing licensees, other applicants and petitioners to deny, as well as the Commission, and the public in general. [37]

This rulemaking proposal was consistent with former FCC Chairman Mark Fowler's blistering criticism of the process as one in which:

> [P]eople stare down or shake down broadcast applicants before this agency through citizens agreements where they ask for program additions and withdraw for dollars, or where people bring complaints and then withdraw for dollars, or where people file a series of applicants but never build and they settle, always for dollars.[38]

In addition to the issue of wastage with the financial payoffs to renewal opponents, settlement for programming changes raised a public policy question about private groups extracting management and content changes from broadcasters. In some ways, these demands rendered the private groups "back door" regulators with no accountability to the FCC or the general public. The FCC often interpreted its rules to disallow some agreements requiring management and content changes in exchange for a private group's withdrawal of its opposition to a broadcaster's license renewal. However,

[37] *See* FCC 88-212, *supra* note 34, at 14.

[38] *At-Large Interview with Mark Fowler*, BROADCASTING (Dec. 23, 1985) at 54.

the FCC seemed to unevenly apply the standards used to interpret these rules.[39] Broadcasters were thus uncertain which agreements would be upheld and which ones would not be.

The 1996 Amendment addressed the problems of comparative hearings. It was meant to give television broadcast license holders greater certainty against loss from competing television broadcasting applicants. As Christopher Sterling notes, "With a sweep of its legislative hand, Congress removed all this [the problems with comparative renewal] with a new subsection (k) added to Section 309 of the 1934 Act [via Section 204 of the 1996 Amendment]…Put simply, the 'comparative' aspect of renewals was eliminated.[40] Lili Levi notes, "Congress replaced the comparative renewal procedure with a significant amount of substantive FCC discretion."[41] The FCC has exercised its vast discretion and maintained its right to change license terms and even move licensees to different frequency allocation. These rights are certainly inconsistent with any broadcaster claim to indefinite rights to specific spectrum. As such, any interpretation of the 1996 Amendment as giving property rights to broadcasters is unfounded based on both the lack of legislative history that would normally accompany such a monumental policy shift and the fact that Section 204 was clearly designed to address the historical problems related to comparative renewal in the broadcast industry.

D. Practical Application of the 1934 Act and 1996 Amendment May Imply Some Property Rights

Despite the text of the statute and its legislative history, the application of the 1934 Act suggests that FCC licenses may confer property rights. Historically, FCC

[39] Burden, *supra* note 30, at 275.

[40] Sterling, *supra* note 32, at 595-96.

[41] Levi, *supra* note 29, at 248.

licenses have been renewed regularly and holders have come to expect such renewals. Howard Shelanski and Peter Huber trace the historical evolution of FCC spectrum license rights, indicating that, during the middle of the 20th century, these rights evolved into "dense web of rules governing license retention and alienability, transmission and programming rights, and signal privacy and exclusivity."[42] Their analysis suggests that, over time, the manner in which FCC licenses were administered has caused them to mimic property rights.

Starting in the 1970s, the FCC established a variety of regulatory reforms that "have in fact created substantial property rights for spectrum licenses, the language of the 1934 Act notwithstanding."[43] The major change was in 1970 when the Commission committed to a policy of an expectation of renewal "so long as the applicant's performance was more than 'minimal' even if challengers were superior under some criteria set forth in the 1965 Policy Statement."[44] The idea behind this shift was to give license holders certainty and thus the incentive to invest in the development of the spectrum and the launching of new services. Also in the 1970s, the FCC made the renewal process easier and less expensive by eliminating many of the logs and other bookkeeping requirements necessary for renewal.[45] The increased ease of renewal suggests the process was becoming more of a formality and bolsters the argument that spectrum holders could expect to have long-term rights to the spectrum.

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[42] Howard Shelanski & Peter Huber, *Administrative Creation of Property Rights to Radio Spectrum,* 41. J.L. & ECON. 581 (1998) at 582 [hereinafter Shelanski & Huber]

[43] Shelanski & Huber, *supra* note 42, at 582.

[44] Shelanski & Huber, *supra* note 42, at 587, citing the application of Cowles Broad., 86 F.C.C.2d 993 (1981); *see also* Cowles Florida Broad., 60 F.C.C.2d 953 (1977) (renewing a license despite preference for a challenger on diversification).

[45] Shelanski & Huber, *supra* note 42, at 588.

In 1981, license terms were increased from three to five years for television and from five to seven for radio.[46] In 1989, the FCC adopted additional changes that made third party challenges to renewal more difficult.[47] Many of these reforms were codified in the 1996 Act, which in addition to extending license periods to eight years, provided broadcasters an expectation of a renewal so long as the broadcaster is reasonably compliant with the license rules and has been serving the "public interest, convenience and necessity."[48] This change gives the broadcasters some leverage in blocking administrative changes by the FCC that would eliminate their interests in their licenses. Krystilyn Corbett argues that, although the change in the renewal policy was couched in language of public interest, it more likely represents a shift toward a private market model of regulation[49] designed to encourage license holders to invest in their businesses. The essence of this argument parallels that of Profs. Shelanski and Huber in that it contends there has been a progressive movement towards privatization of spectrum rights over time motivated by a government desire to encourage investment in developing the communications industry. This move represents a shift from a public trust model for spectrum whereby "certain property is to be used for public benefit"[50] to a private market model whereby "instead, spectrum users and the FCC operate as if spectrum licensees are private parties with interests in a valuable, scarce resource."[51]

Currently, all FCC license holders expect that their licenses will be renewed

[46] Shelanski & Huber, *supra* note 42, at 588.

[47] Shelanski & Huber, *supra* note 42, at 588.

[48] 1996 Amendment to the Telecommunications Act of 1934, Sec. 204(a)(1).

[49] Krystilyn Corbett, *The Rise of Property Rights in the Broadcast Spectrum*, 46 DUKE L.J. 611 (1996) [hereinafter Corbett].

[50] Corbett, *supra* note 49, at 615.

[51] Corbett, *supra* note 49, at 634.

absent egregious violation of the license terms. Corbett goes so far as to say that this expectation has gone so far as to create an implicit guarantee: "[T]he relationship between broadcasters and their regulators seems in fact to have created an implicit guarantee that broadcasters' licenses will not easily be revoked by the government."[52] This "implicit guarantee" has been evidenced by statements made by various government officials including FCC Commissioners,[53,54] FCC Technical Papers,[55] and even members of the executive branch.[56]

In addition to renewal expectations, the broadcasters' increased ability to transfer licenses suggests that the broadcasters may possess property interests in their licenses. In 1951, Congress amended the 1934 Act to prevent "consideration of whether transfer to a

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[52] Corbett, *supra* note 49, at 636.

[53] "Speaking to a group of broadcasters, FCC commissioner Robert McDowell said he favors 'exploring the possibilities' of voluntary transfer of some broadcast spectrum for wireless broadband use 'as long as it is truly voluntary. '" *McDowell Backs Voluntary Transfers, Seeks Advice,* BROADCASTENGINEERING.COM (July 1, 2010, 1:10 PM), http://broadcastengineering.com/RF/robert-mcdowell-voluntary-broadcast-spectrum-0701.

[54] "The [national broadband] plan, as [FCC Chair]Genachowski described to the NAB, 'proposes voluntary incentive auctions -- a process for sharing with broadcasters a meaningful part of the billions of dollars of value that would be unlocked if some broadcast spectrum was converted to mobile broadband. '" Scott M. Fulton III, *Oh Really? NAB Head Suggests to Congress FCC's Broadband Plan is 'Voluntary,'* BETANEWS.COM (Apr. 29, 2010, 1:41 PM), http://www.betanews.com/article/Oh-really-NAB-head-suggests-to-Congress-FCCs-Broadband-Plan-is-voluntary/1272562494.

[55] "Though we recognize the uncertainty inherent in predicting the outcome of this [spectrum allocation to increase mobile broadband spectrum] process, we are confident that the analysis in this paper and the tools under development at the FCC could enable the FCC, with extensive public input throughout a rulemaking proceeding, to establish a voluntary process that recovers a significant amount of spectrum from the broadcast TV bands while preserving consumer reception of, and public interest served by, OTA[other the air] television." *Spectrum Analysis: Options for Broadcast Spectrum OBI Technical Paper No. 3*. FEDERAL COMMUNICATIONS COMMISSION, June 2010, at 2,http://download.broadband.gov/plan/fcc-omnibus-broadband-initiative-(obi)-technical-paper-spectrum-analysis-options-for-broadband-spectrum.pdf.

[56] Lawrence Summers, director of the National Economic Council, is quoted as saying "Our plan [to free-up spectrum for mobile broadband] will allow all stations that currently broadcast the right to continue to broadcast," he said in a speech at the New America Foundation on June 29, 2010." It is based on the principle of voluntarism…Our plan will allow all stations that currently broadcast the right to continue to broadcast," he said in a speech at the New America Foundation. *See Summers Emphasizes Voluntary Return of Broadcast Spectrum,* TELEVISIONBROADCAST.COM (June 28, 2010), http://www.televisionbroadcast.com/article/102670.

party other than the proposed transferee would better serve the public interest."[57] In 1981, the Supreme Court ruled "that the FCC had the discretion not to condition transfers on programming issues."[58] The FCC has also backed away from a bar on "trafficking" licenses,[59] and now insists on only a one-year retention before a licensee can transfer the license to another entity. Although the FCC has barred subdividing and transferring blocks of the broadcast spectrum to third parties,[60] it has also "reduced limits on subdivision and classified time brokering as a 'joint venture' that would generally be approved."[61] Shelanski and Huber also note that in cellular telephony and satellite television, the FCC has been increasingly flexible in allowing license holders to shape and slice the spectrum.[62] Most FCC license holders now view their FCC licenses as commodities they can sell, and perceive approval of license transfers as a formality absent significant policy concerns, such as anti-trust.

Despite renewal expectations and the increased ability to transfer licenses, however, other language in the 1996 Amendment suggests that licensees do not possess property rights. Specifically, the Amendment permits the FCC to change a broadcaster's rights considerably upon renewal. As Lili Levi notes, "in changing the renewal procedure, it [the FCC] did not eliminate the FCC discretion and the possibility of more

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[57] Shelanski & Huber, *supra* note 42, at 590.

[58] FCC v. WNCN Listeners Guild, 450 U.S. 582 (1981) (overturning WNCN Listeners Guild v. FCC, 60 F. 2d 838 (D. C. Cir 1979).

[59] Shelanski & Huber, *supra* note 42, at 590-91.

[60] Shelanski & Huber, *supra* note 42, at 592.

[61] Shelanski & Huber, *supra* note 42, at 593, citing Revision of Radio Rules and Policies, Report and Order 7 F.C.C.R.2755, 2784 (1992) [hereinafter FCC Radio Order]. Joint ventures between separately owned stations allow efficient joint advertising sales, shared technical facilities, and joint programming arrangements, that is, "time brokerage."

[62] Shelanski & Huber, *supra* note 42, at 593.

direct FCC impact on broadcaster conduct via the renewal mechanism."[63] For example, the FCC could significantly reduce a broadcaster's current spectrum allocation of 6 Mhz and/or move it to a less desirable part of the frequency band. Thus, the FCC could effectively reduce and/or eliminate any property rights potentially given by the renewal expectations. The FCC's discretion to make these changes upon renewal suggests the government has retained significant control with respect to the spectrum. In addition, television broadcasters have limits to their discretion in dividing their spectrum, albeit reduced from prior levels, and face substantial regulation of the content they can broadcast.[64] As such, the continuing government control of the broadcasting spectrum through its determination of the terms of renewal and use restrictions undermine the broadcasters' claim of property rights. Ability to control and limit access is a fundamental aspect of ownership and the broadcasters simply do not have those rights.[65]

E. Bankruptcy Precedent does not Support Spectrum Property Rights.

Bankruptcy precedent also suggests that broadcasters do not possess property rights. In *FCC v. Nextwave Commc'ns, Inc.*,[66] the Court ruled that the FCC could not cancel Nextwave's licenses while Nextwave was in bankruptcy due to non-payment of auction payments. Although the Court appeared to consider spectrum as property of the Nextwave estate, *Nextwave* was an anomaly in this regard because the amounts

[63] Levi, *supra* note 29, at 278.

[64] Shelanski & Huber, *supra* note 42, at 596-97.

[65] The FCC's use limitations on the television broadcasters inflict a considerable social cost because these limits constrain the spectrum from being used for its most valuable applications. *See* Shelanski & Huber, *supra* note 42, at 600. Moreover, broadcasters are not allowed to charge for their transmissions nor are they able to control who receives their transmissions. *See id. at 601.* This severely restricts their business model options. For example, they cannot use any form of a subscription model. However, there is movement to allow broadcasters more flexibility and 47 U.S.C.A. § 605 has been interpreted to allow subscription programming by broadcasters in some limited circumstances, but this has typically applied to newer technologies as opposed to television broadcasting. *See id. at 603.*

[66] FCC v. Nextwave Commc'ns Inc., 537 U.S. 293 (2003). [Hereinafter *Nextwave*].

Nextwave owed for its license payments were setup as a lien against the license. While this structure would seem to give the FCC greater ability to attach the license, this power was curtailed when Nextwave went into bankruptcy. In the bankruptcy proceeding, the FCC became a creditor who was owed money in exchange for the license. The Court found that bankruptcy courts' protection protects a debtor's assets from creditors during the bankruptcy process. Largely as a result of *Nextwave*, the FCC no longer uses the lien structure and instead, simply makes meeting the auction payment schedules a requirement for maintaining the license. This may seem like merely a semantic difference, but it is crucial in terms of how the courts treat the licenses in a bankruptcy. Without the lien structure, the license is not property of the estate for bankruptcy purposes. In most bankruptcy cases, the FCC allows the bankruptcy court to transfer the FCC license from the licensee to the debtor-in-possession company, but this is entirely up to the FCC's discretion. The FCC could choose not to exercise comity with the bankruptcy court and deny the transfer. This would eliminate any value in the license for the license holder. As FCC spectrum licenses are only part of the bankruptcy estate when the FCC uses a lien structure (which it no longer does) or voluntarily agrees to exercise comity with the bankruptcy court, bankruptcy precedent suggests that FCC licenses have no property value.

In a recent bankruptcy decision, *Sprint Nextel v. U.S. Bank Nation (In re TerreStar)*[67] the court affirmed the principle that creditors cannot have a lien on an FCC spectrum license as it is not property of the debtor's estate but narrows this distinction. In *TerreStar*, TerreStar was a communications company that filed for bankruptcy with a

[67] In re TerreStar Networks, Inc., No. 10-15446 (SHL), 2011 WL 3654543 (Bkrtcy. S.D.N.Y. Aug. 19, 2011). [hereinafter *Terrestar*].

large amount of both secured and unsecured debt. When the estate was sold, Sprint, an unsecured creditor, argued that unsecured creditors, including itself, should be entitled to share the proceeds from the sale of TerreStar's spectrum license. The primary basis of its argument was that the lien of the secured creditors did extend to the spectrum license as the FCC rules do not permit liens on spectrum licenses. While the court upheld the argument that secured creditors cannot have a lien on spectrum licenses as they are not property of the debtor's estate, the court also ruled that lien creditors can have an economic interest in the proceeds or the economic value of the license when it is sold.[68] While the *TerreStar* court makes a fine distinction about a lien on an FCC spectrum license, which is not permitted, and a lien on the proceeds from the sale of the license which is permitted, the decision nonetheless upholds the principle that an FCC license itself is not property that a debtor can attach.

F. Tension between 1934 Act and 1996 Amendment Favors 1934 Act's Clear Denial of Property Rights

There is inherent tension between the text of the 1934 Act, which states FCC licensees have no property rights, and the seeming implicit guarantees of renewal and increased ability to transfer in the 1996 Amendment. Taken as a whole, Shelanski and Corbett convincingly argue that FCC license holders have some expectation of property rights based on the historical administration of the licenses and changes in regulations. This view is supported by decades of policy decisions, both at the FCC and at the Congressional levels. Arguably, nearly 60 years of policy and legislative changes should outweigh the text and legislative history of a 76-year old Act that was implemented when the communications industry was extraordinarily different from its modern state. The

[68] *TerreStar*, at 16.

plain text of the Act, however, explicitly states that no such property rights exist. Despite ample opportunity to do so, Congress has never amended this provision. Moreover, the context of the 1996 Amendment suggests it was not intended to limit the government's ability to change spectrum licenses or confer additional ownership interests on licensees. Overcoming plainly expressed legislative intent is always a difficult task. Accordingly, despite the modern practice, which suggests the FCC licenses may mimic real property, it is likely that any claim that broadcasters possess property rights in their licenses would ultimately fail.

III. Analogous Cases Regarding Ranchers' Grazing Permits Suggest No Property Rights for Spectrum License Holders

Judicial treatment of licenses to use federal land for cattle grazing is instructive in analyzing potential broadcaster claims of property rights in FCC licenses. Grazing rights and broadcasting rights are analogous in that they are both renewable licenses to use government property for a specific period of time, for a specific purpose, and are held by a politically powerful industry. Grazing rights, elaborated in the Taylor Grazing Act of 1934[69] ("Taylor Act") are issuable for up to ten-year periods and are renewable. The Secretary of the Interior has broad latitude to regulate their issuance. Like the Communications Act of 1934, the Taylor Act clearly states that the rights do not constitute property interests: "So far as consistent with the purposes and provisions of this subchapter, grazing privileges recognized and acknowledged shall be adequately safeguarded, but the creation of a grazing district or the issuance of a permit pursuant to the provision of this subchapter shall not create any right, title, or interest in or to the

[69] 43 U.S.C. § 315(b) (1976).

lands."[70] Subsequent case law has supported the plain meaning interpretation of this statute and held that grazing permits carry no property right to own or use federal lands.

A. Grazing Permits, Like Spectrum Licenses, Often Mimic Property Interests

Like broadcasting licenses, grazing permits have slowly assumed the outward appearance of property rights. For example, grazing permits are not only an integral part of the property value of adjoining ranches, but also they can be used as collateral for loans with banks, such as the Farm Credit Bank of Texas, an arm of the once public credit system established by Congress to make loans to farmers and ranchers.[71] Moreover, like property, grazing permit holders can be passed on to the next owners of ranches and can also be inherited and taxed.[72] Given these precedents, Fredrick Obermiller and some other agricultural academics claim that ranchers possess limited property rights to use the federal lands they lease. This right, Obermiller argues, is "an interest roughly akin to fee farming or the old feudal practice of a king granting royal subjects extended use of royal property for farming or herding."[73] Obermiller not only points to industry practice, but also suggests that Congress really intended to prevent property rights in grazing permits with the Taylor Grazing Act of 1934.[74] He asserts that the original version of the Taylor Act explicitly established grazing rights based on local customs and other criteria and contends the provision prohibiting property rights was

[70] 43 U.S.C. § 315(b) (1976).

[71] Jim Nesbitt, *Taking Aim,* AMERICAN COWBOY, at 39-40 (May-June 1996) [hereinafter Nesbitt].

[72] Nesbitt, *supra* note 71, at 39-40.

[73] Nesbitt, *supra* note 71, at 40.

[74] Frederick W. Obermiller, *Did Congress Intend to Recognize Grazing Rights? An Alternative Perspective on the Taylor Grazing Act,* RANGELANDS, at 186 (Oct. 1996) [hereinafter Obermiller].

made in an amendment added via an unrecorded mark-up of the bill not subject to public debate.[75] Taken as a whole, these arguments seem remarkably similar to Shelanski and Huber's arguments that spectrum licenses may confer property rights. In fact, the argument for grazing permits as property is even stronger than that for broadcasting spectrum licenses. This relative strength is based on the local customs allowing free use of lands for over a hundred years prior to the passage of the Taylor Act and the credible argument that the true legislative intention of the 1934 Taylor Grazing Act supported property rights.[76]

B. Courts Have Concluded Grazing Permits Are Not Property

Despite the somewhat compelling arguments suggesting an ownership interest in grazing permits, the permit owners were unsuccessful in claiming that their permits conferred property rights. In contrast to broadcasting rights, the Supreme Court has directly addressed the issue of grazing property rights. In *U.S. v. Fuller*, the Court firmly concluded that grazing permits do not constitute property rights.

In *U.S. v. Fuller*[77] the United States condemned a section of a rancher's land bordering state land that the rancher leased from the government for grazing. The rancher argued that market value used for compensation under eminent domain should include the fact that his land bordered the federal land that he leased from the government for cattle grazing. In *Fuller*, the Court ruled that since the rancher had no property interest in the government land, and the government was free to not renew the grazing rights

[75] Obermiller, *supra* note 74, at 186.

[76] Public Lands Council v. Babbitt, 529 U.S. 728 (2000), citing R. White, "Its Your Misfortune and None of My Own": A History of the American West 223 (1991).

[77] United States v. Fuller, 409 U.S. 488 (1973).

without compensation, it would be inappropriate to consider the ranch's proximity to federal land for the purposes of determining eminent domain compensation. The court made this ruling despite acknowledging that a potential buyer might pay more for the property due to its location and potential to secure grazing rights.

The Supreme Court unanimously reaffirmed the principle that grazing permits do not confer property rights in *Public Lands Council v. Babbitt,*[78] The suit was filed on behalf of farmers claiming that recent changes in the grazing permit system violated the Taylor Act and harmed their interests. The Court interpreted the Taylor Act to give the Secretary of the Interior broad latitude in changing the grazing permit system to optimize land use and to determine which grazing permits should be safeguarded and which ones should not. The *Babbitt* opinion is also notable for its close textual interpretation of the Taylor Act. The Court explained:

> The legislative history to which the ranchers point show Congress expected that ordinary permit holders would be ranchers, who engage in the livestock business, but does not show any absolute requirement…Congress could have reasonably written the statute to mandate a preference in the granting of permits to those actively involved in the livestock business, while not absolutely excluding the possibility of granting permits to others. The Secretary [of the Interior] has not exceeded his powers under the statute [by granting permits to those not in the livestock business]"[79]

The Court in *Babbitt* also cited the history of United States ranching traditions in using federal land[80] and some of the practical implications in terms of impact on the ranching industry such as reduced credit availability for ranchers,[81] but ultimately decided the case

[78] Babbitt, 529 U.S. at 741-43.

[79] Babbitt, 529 U.S. at 746-47.

[80] Babbitt, 529 U.S. at 731-33.

[81] Babbitt, 529 U.S. at 744.

based on a clear textual interpretation. The *Babbitt* Court specifically referenced its earlier decision in *United States v. Nordic Village, Inc.*, which called for strict textual interpretation.[82] In fact, *Babbitt* has been cited in a variety of contexts as a guide to textual analysis of legislation. Under a similar textual approach, finding that FCC licenses confer property rights would require ignoring unambiguous language in the Communications Act of 1934. Accordingly, applying the *Babbitt* approach to FCC licenses, a court is unlikely to find that the broadcasters have any property rights.

The 10th Circuit in *Federal Lands Legal Consortium v. U.S.* (1999)[83] also held that grazing rights were not property. However, the court used an analysis that went beyond the text. The *Federal Lands Legal Consortium* court explained[84] that the Supreme Court in *Board of Regents of State Colleges v. Roth* (1972)[85] abolished the arbitrary distinctions between licenses and property and held that fundamental rights determine the existence of any property interest. *Roth* involved a college instructor whose contract was not renewed. The Court determined that the teacher was not entitled to any property interest in the contract and was not owed due process prior to non-renewal. The *Federal Lands Legal Consortium* court did not limit its analysis to the plain wording of the contract, which explicitly disclaimed any property rights, and explained:

> [T]he Court has fully and finally rejected the wooden distinction between 'rights' and 'privileges' that once seemed to govern the applicability of procedural due process rights. The Court has also made clear that the property interests protected by procedural due process extend well beyond actual ownership of real estate, chattels, or money. By the same token, the

[82] Babbitt, 529 U.S. at 746, citing United States v. Nordic Village, Inc., 503 U.S. 30, 36 (1992) ("[A] statute must, if possible, be construed in such fashion that every word has some operative effect").

[83] Federal Lands Legal Consortium v. U.S. 195 F. 3d 1190 (10th Cir. 1999).

[84] Federal Lands Legal Consortium, 195 F.3d at 1197.

[85] Board of Regents of State Colleges v. Roth, 408 U.S. 564, 571 (1972)

> Court has required due process protection for deprivations of liberty beyond the sort of formal constraints imposed by the criminal process.[86]

Despite the language in *Roth* suggesting that courts look beyond the mere words in the contract, the *Federal Lands Legal Consortium* court still concluded that, although the Department of the Interior is required to prioritize certain licensees for renewal, it has discretion in determining the terms of the renewal. The court found that, because the government has maintained sufficient control, ownership has not transferred and thus the grazing licenses are not property of licensees:

> [D]uring the permit renewal process, an applicant has a priority for a permit only "[s]o long as . . . the permittee . . . accepts the terms or conditions to be included by the Secretary . . ." 43 U.S.C. § 1752(c)(3); see also16 U.S.C. § 580l ("The Secretary of Agriculture in regulating grazing on the national forest . . . is authorized, upon such terms and conditions as he may deem proper, to issue permits for the grazing of livestock. . . ."). The Forest Service, in turn, has discretion to require any change it deems necessary, see16 U.S.C. § 580l; 43 U.S.C. § 1752(e); 36 C.F.R. § 222. 3(c)(1)(vi), including discretion to set the "numbers of animals to be grazed and the seasons of use," 43 U.S.C. § 1752(e); 36 C .F.R. § 222. 3(c)(1)(i), which are, in essence, the permit changes at issue in this action. In the circumstances, even if FLLC's priority in some way restrains the Forest Service's discretion to issue or deny a permit, it does not restrain the Forest Service's discretion to set the terms or conditions of the permit. Thus, FLLC would not appear to have a legitimate claim of entitlement to the terms and conditions of their previous permits.[87]

The FCC has similar discretion in deciding the terms of renewal for broadcasters' licenses. For example, the FCC recently required the broadcasters to transition from analog to digital broadcasting and reduced the amount of spectrum allocated to the broadcasters. Furthermore, a recent FCC Report and Order[88] stated that:

> Even after licenses are awarded, the Commission may change the license terms "if in the judgment of the Commission such action will promote the

[86] Roth, 408 U.S. at 571-72.

[87] Federal Lands Legal Consortium, 195 F.3d at 1198-99.

[88] FCC REPORT 10-201, at 74-75 (Dec. 23, 2010) [hereinafter FCC Report 10-201].

> public interest, convenience, and necessity"(47 U.S.C. § 316(a)(1)). The Commission may exercise this authority on a license-by-license basis or through a rulemaking, (*See WBEN Inc. v. United States*, 396 F.2d 601, 618 (2d Cir. 1968)) even if the affected licenses were awarded at auction. *(See* 47 U.S.C. §309(j)(6); *Celtronix Telemetry v. FCC*, 272 F.3d 585 (D.C. Cir. 2001)). [431]

In this recent report and order, the FCC is clearly asserting its right to regulate the terms of licenses not only on renewal but also during the terms of the licenses, even though the license holder paid for them.[89] As discussed in Section II (C) *supra*, the 1996 Amendment to the 1996 Telecom Act increases the FCC discretion concerning renewal evaluations as it replaces comparative analysis with the FCC's discretion as to whether the broadcaster is acting in the "public interest, convenience and necessity." As such, in light of *Babbitt*, a court would not likely analyze the potential property interests in FCC licenses beyond the text of the relevant legislation. Even if a court were to do so, *Federal Lands Legal Consortium* and recent FCC orders nevertheless support the conclusion that the broadcasters' licenses are not property. Accordingly, the lack of success of the grazing permit owners in asserting property rights in their permits with perhaps more favorable arguments than the broadcasters does not bode well for the broadcasters. Lacking similar legislative and social history support, the grazing permit precedent gives the broadcasters have little reason to hope for a better outcome.

C. Any Property Rights Would Nevertheless Exclude Higher Value Broadband Use

Even if the broadcasters possessed property rights in the spectrum and were therefore entitled to some compensation for the nonrenewal of their spectrum rights, they would not be entitled to the incremental value due to the government's future use and/or

[89] The FCC report is, of course, the FCC's opinion and does not necessarily reflect how a court might rule. A cynical view might be that this statement is merely meant to be a bit of "saber rattling" by the FCC to "loosen-up" the broadcasters with a thinly veiled threat as opposed to a substantive legal opinion.

need of the spectrum for higher value mobile broadband applications. Any such compensation would be limited to the value of the spectrum for its current television broadcasting use.

In *Fuller*, the Court cited *U.S. v. Miller*[90] which held that the increase in fair market value "represented by knowledge of the Government's plan to construct the project for which the project was taken was not included within the constitutional definition of 'just compensation.'"[91] In *Fuller*, the Court also cited *U.S. v. Cors*,[92] where the Court ruled that compensation to the owner of a tugboat that was requisitioned by the government during World War II could not include the appreciation of the value in the tugboat created by the government's increased wartime demand. In *Cors*, the Court said: "That is a value which the government itself created and hence in fairness should not be required to pay."[93] In *United States v. Olson*,[94] the Court ruled that the person whose property is condemned by the government "is entitled to be put in as good a position pecuniary as if his property had not been taken. He must be made whole but he is entitled to no more."

The use of the broadcasting spectrum for higher value applications is highly analogous to the knowledge of a future government use as in *Miller* or the value added by the government's need as in *Cors*. Under the Court's reasoning in *Cors*, *Miller*, and *Olson*, the government would not have to compensate the broadcasters for any value beyond their present use of the spectrum for television broadcasting. Broadcasters are

[90] United States v. Miller, 317 U.S. 369 (1943).

[91] Fuller, 409 U.S. at 491.

[92] United States v. Cors, 337 U.S. 325 (1949).

[93] Cors, 337 U.S. at 1091.

[94] Olson v. United States, 292 U.S. 246, 255 (1934).

simply not entitled to compensation for the higher value use for which the government intends to reallocate the spectrum.

IV. Government Could Short-Circuit Any Alleged Property Interest by Amending the Communications Act

Even if the broadcasters had a cognizable claim for property rights in the spectrum based on their renewal expectations, the government could simply avoid compensating them by changing the law. Scholars differ as to whether impacted entities should be compensated for the costs of regulatory changes when there has been an implicit agreement that the entities could rely on the existing regulation. Recent court cases, however, make clear the government does not owe such compensation absent explicit guarantees that the impacted entities could rely on the existing regulation.

Professors J. Gregory Sidak and Daniel F. Spulber argue that a regulated entity should not be able to assume that the law will remain the same, but that it should be able to rely on an implicit agreement with the government.[95] This can be a problematic distinction. How does one show that there was an implicit agreement? How can the government change a regulation without concern that it might be violating an "implicit agreement"? Sidak and Spulber argue that regulators should compensate companies for the cost of the "stranded assets"[96] in which the companies invested but cannot utilize as a result of the regulatory change. They also argue that companies should be compensated

[95] Gregory J. Sidak & Daniel F. Spulber, *Givings, Takings, and the Fallacy of Forward Looking Costs,* 72 N.Y.U. L. REV. 1068, 1104 (1997) [hereinafter Sidak & Spulber].

[96] Sidak & Spulber*, supra* note 95, at 1093.

for "investment backed expectations"[97] that were made on the basis of a then-existing regulatory regime, even if they were based on the expectation of a regulatory monopoly.

Under Sidak and Spulber's reasoning, the broadcasters may have an implicit agreement with the government that entitles them to the full expectation of what they hoped to make based on permanent rights to their spectrum. The lack of an explicit governmental promise of permanent spectrum rights is immaterial. Sidak and Spulber argue that, in *United States v. Winstar*,[98] the Supreme Court rejected the government's defense that it did not owe compensation because the plaintiff did not meet the "unmistakability" standard.[99] The *Winstar* case involved significant tax incentives to financial institutions for taking over failing thrifts. Congress later changed these rules, and one of the banks sued for damages. In *Winstar*, the government argued that the plaintiff must show that the government made certain promises in "unmistakable" terms. The Court rejected this argument, indicating that the "unmistakability doctrine" only applies if the agreement is one that restricts the government's sovereign power, such as an agreement to give up sovereign power to change a law. The Court reasoned that the doctrine does not apply to ordinary course contracts because it would compromise the government's ability to enter into such contracts.[100]

Sidak and Spulber quote Justice Souter's plurality opinion that the unmistakability defense for ordinary contracts would "place the [unmistakability] doctrine at odds with the Government's own long-run interest as a reliable contracting partner in the myriad of

[97] Gregory J. Sidak & Daniel F. Spulber, *Deregulatory Takings and Breach of the Regulatory Contract,* 71 N.Y.U. L. REV. 851, at 864 (1996).

[98] United States v. Winstar, 518 U.S. 839 (1996).

[99] Sidak & Spulber*, supra* note 95, at 1148.

[100] Winstar, 518 U.S. at 880.

workaday transaction of its agencies."[101] Sidak and Spulber therefore suggest that the government should also compensate those harmed by regulatory change even if the government did not "unmistakably" promise not to change the system. The regulatory regime should, in their view, be treated as a contract. Presumably, this would include broadcasters if Congress were to change the 1996 Amendment to the 1934 Act so that broadcasters could not renew their spectrum rights despite expectations or implicit promises otherwise. Thus, based on *Winstar*, Sidak and Spuber would view the 1934 Act as a contract that the government must either honor or compensate license holders if it does not.

Profs. Willian J. Baumol and Thomas W. Merrill, however, argue that the government need not compensate companies for losses due to a removal of monopoly-based expectations. This would presumably include changes to legislation such as changes to the 1934 Act that denied broadcasters' renewal rights and thus ending the broadcasters' monopoly use of the spectrum. Baumol and Merrill contend implied promises still need to meet the "unmistakability" test. Baumol and Merrill explain:

> Four justices joined in Justice Souter's plurality opinion, which would have recognized an exception to the unmistakability doctrine for government "indemnification" agreements holding entities harmless in the event of future changes in regulation. However, a majority of five Justices rejected such an exception. Justice Scalia, joined by two other Justices, saw no need to create the exception, because in his view the contracts in question unmistakably promised the acquiring S&Ls they would receive favorable accounting treatment…Thus, by a vote of five to four, Winstar reaffirmed the unmistakability doctrine and rejected Justice Souter's proposed exception.[102]

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[101] Sidak & Spulber*, supra* note 95, at 1148.

[102] William J. Baumol & Thomas W. Merrill, *Deregulatory Takings, Breach of Regulatory Contract,and the Telecommunications Act of 1996,* 72 N.Y.U. L. REV. 1037, 1046 (1996) [hereinafter Baumol & Merrill].

They further note that implied promises based on past dealing are unlikely to meet this standard:

> To show in "unmistakable" terms that any of these promises [related to guarantee of a regulatory monopoly] was made, it will almost certainly be necessary to point to specific language in a corporate charter, franchise agreement, or public utility statute, or a longstanding judicial doctrine, that expressly reflects these understandings. Implied understandings based on a long course of dealing, or action taken in reliance on apparently settled practices, might plausibly be thought to give rise to a contract between the government and the LECs. But it will be much harder to show that these practices reflect an unmistakable contractual agreement.[103]

Moreover, Baumol and Merrill argue that this interpretation is good public policy. If the government pays compensation for monopoly profit expectations, consumers would not benefit from the regulatory changes. Instead, these benefits would be absorbed by the compensation to the prior monopolists. Moreover, Baumol and Merrill argue that removal of an advantageous pricing standard is not a taking, nor is historical cost relevant in determining fair cost in the present period.[104]

The debate between Sidak/Spulber and Baumol/Merrill may have been resolved by the subsequent Supreme Court case, *Verizon Communications v. FCC*.[105] In this case, the Court held "the FCC can require state commissions to set the [new]rates charged by incumbents for leased elements on a forward-looking basis untied to the incumbents' [past]investment." Verizon argued that its rates should be based on its investment as opposed to the current and future market prices for the equipment. Verizon was exposed to market risk on its prior equipment investments. Yet, this regulation was not deemed to be a regulatory taking, nor was it "unreasonable" to justify the Court's setting it aside. By

[103] Baumol & Merrill, *supra* note 100, at 1047.

[104] Baumol & Merrill, *supra* note 100, at 1045.

[105] Verizon v. FCC , 535 U.S. 467 (2002).

way of analogy, the broadcasting market's decline is not something that the government should be required to subsidize through continued "must carry" regulation or repurchase of broadcasters' spectrum after their licenses expire.

The *Verizon* case implies that the government has significant latitude to simply change the rules and not renew the broadcasters' licenses, thus forcing the broadcasters to take a loss on their investments as long as the rationale for the changed rules is not unreasonable. Based on the reasoning in *Verizon*, Congress could change the Telecom Act and not renew broadcasting licensees so that the spectrum can be used for higher value mobile broadband without compensating the broadcasters. Based on this logic, Congress would not be constrained by prior non-binding statements by the FCC, Congressional leaders, or the executive branch. Moreover, the renewal expectations in the 1996 Amendment to the 1934 Act would not constrain Congress, as the government did not "unmistakably" revoke its rights to remove those renewal expectations. Any implied expectations would likely yield to the clear statutory text of the 1934 Act, which states that the broadcasters do not have property interests in their spectrum licenses. The government could simply change the law to eliminate renewal expectations, allow existing licenses to expire, and reallocate the spectrum without compensating broadcasters. However, as explained Sections VI and VII of this paper, this may not be the most politically efficient solution.

V. Principles of Traditional Property Law Provide Little Support for Any Broadcaster Claims to Property Rights

Another perspective that may suggest FCC license holders have property rights is based on principles of general property law. This analysis is consistent with Judge

Easterbrook's "Law of the Horse"[106] argument that calls for evaluating technology laws and rights using the same laws used for traditional property rather than creating new areas of law specifically geared toward developing areas in the economy. An advantage of relying on well-established traditional property law is that it can minimize the deliberations that would be necessary to agree upon and codify new alternative paradigms specific to technology, which would save considerable time. Given the relative urgency of the National Broadband Proposal[107] and the need for additional mobile broadband spectrum, time is a significant consideration.

Traditional property law is well-suited to analyze the issue of whether FCC licenses confer property rights. Traditional property law provides several frameworks in which someone who has been using property for an extended period, such as the television broadcasters, can claim property rights without an actual written agreement, even where the original owner (the government in this instance) clearly did not intend to give up property rights. An analysis of traditional property principles suggests broadcasters have an arguable, albeit weak, claim of property rights.

A. Elements of Property

The most basic element of property rights consists of "the ability to have exclusive use to determine how a resource is used."[108] Clearly, broadcasting licenses fit this definition because a broadcasting license prevents others from broadcasting on the

[106] Frank H. Easterbrook, *Cyberspace and the Law of the Horse*, 1996 U. CHI. LEGAL F. 207 (1996).

[107] A major goal of the National Broadband Proposal is to allocate an additional 300 Mhz to mobile broadband within five years and 500 Mhz by 2020 as well as provide 100Mbs of broadband service to most U.S. homes by 2020.

[108] Armen A. Alchian, *The Concise Encyclopedia of Economics: Property Rights*, LIBRARY OF ECON. & LIBERTY, http://www.econlib.org/library/Enc/PropertyRights.html (last visited June 5, 2010).

licensed spectrum. Spectrum rights, like rights to traditional property, are geographically bounded. Spectrum rights are also frequently limited ("authorized") to only allow certain types of use, just as traditional property can be "zoned" for specific types of use. The television broadcasters are limited by a large array of restrictions including ability to use, ability to sell, inability to charge viewers, public service requirements and a host of other limitations. The critical question for broadcasters is whether the spectrum rights resemble traditional property to the extent that the broadcasters would be entitled to compensation if the government does not renew their licenses.

B. Easement Rights for Broadcasters?

In many cases, a party can argue that it has rights to someone else's property due to an easement. Often, express easements are clearly written into a deed or another recorded document. The statutory text expressly excluding property rights and the absence of other documentation from the FCC shows there is no express easement in an FCC license. In the absence of documentation, however, easements may also be implied. The public policy underlying implied easements is to reward investment in land and encourage its use. This paper will examine three primary types of implied easements with respect to their potential application to the broadcasters' ability to assert property rights.

1. Easement by Estoppel May Apply

Easement by estoppel occurs when a person with permission to use someone else's land relies on that permission to do something that would be detrimental to the user if the permission were revoked. An illustrative example is *Hollbrook v. Taylor*, where a landowner let his neighbor use his land to access his property and watched the neighbor

build a house that needed the access.[109] The court ruled that the neighbor was entitled to an easement by estoppel. The landowner could not withdraw permission to use that access because the neighbor relied on that permission in building his house and the landowner was aware of that reliance.

Similarly, the broadcasters might argue that they have easement rights to the spectrum based on estoppel. Specifically, the broadcasters might claim that the FCC stood by and watched them invest large amounts of money in their broadcasting businesses based on their spectrum rights, and the agency also approved sales of spectrum at prices that would only make sense if there was an expectation of renewal. The FCC knew of and often explicitly approved their investments, which would be severely harmed if their rights to use the spectrum were withdrawn. License holders who make large infrastructure upgrades or who purchase licenses for high prices towards the end of their license periods have an even stronger case for easement by estoppel.

The digital conversion would support the broadcasters' estoppel argument. In June 2009, Congress and the FCC forced the broadcasters to convert from analog broadcasts to digital transmission. They were required to purchase digital transmission equipment and invest in other changes to meet the new standards. The cost of this conversion varies but a Canadian study[110] estimated the average cost per station/channel

[109] Hollbrook v. Taylor, 532 S.W.2d 763 (Ky. 1976).

[110] Partice Lemée & François O. Gauthier, *Engineering Report ER-008E: Cost Estimate of Digital Television (DTV) Conversion for Canada,* Presented to Canadian Radio-Television & Telecommunications Commission (CRTC) (Mar. 31, 2009), at table 1 and table 2, CRTC.GOV, http://www.crtc.gc.ca/eng/publications/reports/dtv0903.pdf (last visited May 25, 2011) [hereinafter Lemée & Gauthier].

at between a few hundred thousand dollars and a few million dollars, with most in the $250,000 to $1,000,000 range.[111]

The FCC has made over 1,800 digital television channel assignments.[112] Some of these channel assignments may not result in a functional broadcast station. However, assuming there were an estimated 1,750 television stations[113] converting to digital transmission at an average cost of $650,000 each, this would result in a total industry cost of $1.136 billion. One valuation of the broadcasting industry by the FCC places the value at $63.7 billion,[114,] while another by economist Coleman Bazelton puts it at $63.2 billion.[115] While a $1.0 to $1.3 billion investment is not an overwhelming sum relative to estimated broadcasting industry value, this amount is nonetheless substantial. It could support a claim that broadcasters relied upon an expectation of continued rights to the spectrum.

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[111] Calculating an actual conversion cost for a television station is actually quite complex, and the accounting issues involved are significant. A comprehensive analysis the issue is beyond the scope of this paper. However, as a summary of the issue, if the conversion involved only the cost of equipment to replace the output of an old analog station and convert the output to digital, and transmit it in digital, the cost is likely close to the lower end of the range (a few hundred thousand dollars). But most stations kept their analog station, built an interim digital facility, and simulcast for years prior to complete conversion to digital. The electricity cost was also significant during the period of simulcasting, particularly in the high UHF bands, where many transition stations were located. In addition, broadcasters had to maintain two transmitters, towers (including leases), transmission lines, antennas, etc. They later had to move to their final digital facilities, which was often a third facility. The cost of running dual plants for years, for the many stations that did, was probably far greater than the bare cost of the basic digital equipment. Moreover, many stations also upgraded to HD to take advantage of the new digital plants. Finally, much of the variation likely depended on the radio frequency ("RF") engineering that was needed to replicate the transmission which varied with the topography of the license area.

[112] *FCC Announces Final Assignment of Digital Television Channels,* FCC.GOV. (Aug. 6, 2007), http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-275789A1.doc.

[113] This is a slight discount to the 1,800 digital television assignments mentioned *supra* as many were not the result of an analog station converting to digital.

[114] Spectrum, *supra* note 7, at 7.

[115] Coleman Bazelton, *The Need for Additional Spectrum for Wireless Broadband: The Economic Benefit and Costs of Reallocations*, White Paper, at 13 (Oct. 23, 2009) [hereinafter Bazelton].

The UHF stations may have the strongest argument for estoppel because, according to the Canadian study,[116] it was more costly, on average, to convert the higher UHF frequencies. Signals using these higher frequencies do not propagate as far as VHF frequencies, and presumably needed additional RF engineering to successfully convert to digital transmission. There is also a higher conversion cost for stations that had to change frequencies. In the U.S., the UHF band was "repacked" as part of the digital conversion, freeing up the 700 Mhz band for auction. In order use their new bandwidth allocation many UHF stations had to incur the cost of changing frequencies. The UHF channels, on the whole, are also less valuable, making the costs of their conversion to digital much larger relative to their overall value. As such, the UHF stations may have a somewhat stronger argument that the government was aware that their investment was sufficiently substantial that they would have made it only with an expectation of continuing to broadcast for an extended period of time. The broadcasters could point not only to the 1996 Amendment to the 1934 Act, which, as previously discussed, effectively promises renewal rights, but also to the previously discussed statements and actions by the FCC staff and Congress.[117] Taking away their spectrum would effectively be a breach of this implied contract they relied upon in making this investment. The VHF stations can, of course, make the same argument, but the lower cost and their overall higher station value may make their reliance argument somewhat less compelling.

Notwithstanding any merit to the promissory estoppel theory, such lawsuits against the government have traditionally been unsuccessful. In the case of *Office of*

[116] Lemée & Gauthier, *supra* note 110, at 7.

[117] See Section II, Part C of this paper for a discussion of the 1996 amendment to the 1934 Act and statements by government officials.

Personnel Management v. Richmond[118] a disabled government worker was given erroneous advice, both oral and written, from the government personnel office on multiple occasions. Relying on these statements, the worker engaged in activity that resulted in him losing some of his government benefits. The Court held that the government cannot be held responsible for the effect of its employee incorrectly stating the law. Based on this reasoning, the courts would likely consider statements by government officials suggesting that the government would indefinitely renew broadcasting licenses to be erroneous promises. Consequently, as with *Richmond*, a promissory estoppel claim based on the erroneous promises would likely fail as the government cannot be held responsible for the effect of its employees erroneously stating the law. The broadcasters may try to distinguish *Richmond* by arguing that the FCC and executive officials did not misstate the current law regarding spectrum licenses, but rather were misstating future law. However, this distinction is hollow. If the government officials' statements were treated as prediction of future laws, the courts would probably be even less likely to allow an estoppel claim. If the government cannot be held liable for its employees' statement of the actual law, it is even less likely to be held liable for an incorrect prediction of potential legal changes as people would have less reason to rely on such predictions which are inherently uncertain.

Moreover, the government will be able argue that the *Verizon* case effectively prevents estoppel arguments against the government unless there is an agreement in "unmistakable" terms. The FCC licenses are clear on their faces that there is no unmistakable agreement. The FCC could also argue that the broadcasters are

[118] Office of Personnel Management v. Richmond, 496 U.S. 414 (1990).

sophisticated entities, and the FCC's job does not include policing their business investment practices. This is likely to be a very convincing argument.

Although the broadcasters' estoppel claim is weak, it may provide the most support of any traditional property principle for the theory that FCC licenses convey property rights. The FCC, like the Bureau of the Interior in *Babbitt,* is allowed to change its rules without compensation, but *Fuller* indicates that principles of equity are also important: "[t]he constitutional requirement of just compensation derives as much content from the basic equitable principles of fairness, as it does from technical concepts of property law."[119] However, courts have generally used this equitable principle to determine the level of compensation owed for a government action it has determined to be a taking, as opposed to using it to determine whether a government action is a taking and thus due compensation in the first place.[120] Nevertheless, fairness principles and the significant investment made by broadcasters could theoretically support an easement by estoppel argument by the broadcasters. This theory is likely the broadcasters' strongest argument grounded in traditional property law principles. Its ultimate chances of success are slim, however, because an easement by estoppel argument is usually hard to make against the government and, in this case it does not meet the "unmistakability" test.

2. Broadcasters Are Unlikely To Successfully Claim Easements Implied from a Prior Use

If a person has been using property rights for an extended period of time, even without permission, in a manner that should have been discoverable by the owner, the

[119] United States v. Fuller, 409 U.S. 488 (1973).

[120] As an illustrative example, this language was cited in United States v. 564.54 Acres of Land, More or Less, 506 F.2d 796, 799 (3d Cir. 1994). There, the court discussed the valuation of recreational land used by a church where no similar market value was available. Id.

user may be able to claim there was an easement based on prior use. In the classic case of *Van Sandt v. Royster,*[121] property owners whose sewage line ran underneath Van Sandt's property to get to the main neighborhood sewage line were entitled to an easement based on prior use. The court found that Van Sandt should have noticed that this was the design of the sewage system when he bought his home. He had allowed his neighbor's sewage line to run under his home for years without challenging it. Thus, the neighbor was granted an easement from prior use.

In the case of telecommunications spectrum, license holders may argue that the automatic renewal system and the regular allowance of transferring licenses has created a pattern of prior use that essentially grants easement rights. However, the government could easily overcome this argument by contending that the license holders were granted a license that, like a rental agreement, the government can terminate on expiration regardless of the amount of time that passed and regardless of whether its previous policy was to grant renewal. Ultimately, any argument based on easement by prior use would be weak.

3. Easement by Prescription (Adverse Possession) is Unlikely

Easement by prescription/adverse possession occurs when use is without permission (hostile) and done in an open and notorious manner. Where users act as if they have true property rights in an open and notorious manner for a certain amount of time, they can often claim that they have gained those rights via easement by prescription/adverse

[121] Van Sandt v. Royster, 83 P.2d 698 (Kan. 1938)

possession.[122] A critical element is that there must be a non-permissive ("adverse") nature to the possession with respect to the original owner.

It is doubtful the broadcasters' use of spectrum pursuant to their licenses is sufficiently adverse to invoke "adverse possession" rights. The broadcasters might be able to argue that, via their statements and sales of their business interests to investors, they were acting as owners in direct defiance of the Communications Act of 1934 prohibiting such ownership. According to this theory, they have been acting as owners of the spectrum in an adverse manner for decades and are therefore entitled to quiet title of the spectrum.

Proving that the broadcasters have been claiming the spectrum in a non-permissive manner is the most difficult challenge to the adverse possession theory. Virtually all of the television broadcasters use their spectrum largely in accordance with the licenses the government granted them. To establish the non-permissive element, the broadcasters would have to argue that they acted as though they had an ownership interest and were not merely users of the spectrum. As evidence, the broadcasters might use public statements, statements from financial filings and the like, as well as their purchases and sales of spectrum in a manner that is more consistent with ownership. They could argue this evidence implies they were holding themselves out as having an indefinitely ongoing business interest in the spectrum.

[122] Adverse possession is a principle of real estate law whereby somebody who possesses the land of another for an extended period of time may be able to claim legal title to that land. The exact elements of an adverse possession claim may be different in each state. To prove adverse possession under a typical definition, the person claiming ownership through adverse possession must show that its possession is actual, open, notorious, exclusive, hostile, under cover of claim or right, and continuous and uninterrupted for the statutory period. EXPERTLAW.COM, http://www.expertlaw.com (last visited July 28, 2010).

On balance, the broadcasters' argument is ultimately weak as adverse possession is typically based on non-permissive use of property as opposed to non-permissive claims of ownership. Hypothetically, a broadcaster with no license who had been using the spectrum for years might have a reasonable claim for adverse possession. But, such a broadcaster is unlikely to exist. Moreover, courts generally tend to be leery of granting easement by prescription out of fear of depriving innocent owners of their property. As such, the broadcasters' claim to property rights would find little support in this traditional property rights theory.

C. Purchase vs. Assignment of Licenses Should Not Matter

In many cases, FCC spectrum licenses were purchased at auction. In other cases, they were merely assigned to the current holders at no cost. Under a legal analysis, the method of the license acquisition is immaterial to a determination of whether the license confers property rights. In other words, FCC licenses acquired by either purchase or assignment have equal standing in resolving the ultimate question of whether the licenses bestow property rights. There is some political debate, however, about whether license purchasers have a stronger claim to property rights in their licenses than do assignees.

At first blush, a concept of "fairness" suggests that those who paid for their use of the spectrum have a greater claim than those to whom it was merely assigned free of charge. Based on *Fuller* and *Olson*, the government might be able to argue that "fair" compensation that restores users to their original position is much lower for licensees who did not pay the government for their licenses. But, licensees who received their spectrum licenses without paying the government, as is the case with all of the television

broadcasters,[123] could offer two counter arguments. The first is that the return to "original position" should be measured as their position immediately prior to the taking, as opposed to their position before the property interest was acquired. The second is that the license payments were merely "rent" for the period of the initial license term and they do not provide an additional claim to rights after the initial period. Although the FCC has asserted its right to change license terms in the middle of a license period even in the case of licenses for which the holders for the license have paid for their rights,[124] the government is unlikely to terminate a broadcaster's license in the middle of the license period. The FCC's view that it can terminate a license in mid-contract has not been tested and waiting out the remainder of their term would undoubtedly be easier and cheaper than facing extended litigation. Moreover, titles acquired through an easement or adverse possession are no more or less valid because they were not purchased. From a strict legal perspective, whether or not consideration was given for the initial spectrum rights would have little bearing on whether the holder has property rights.[125] From a political perspective, however, license holders who paid large sums for their initial rights may be in a better position to argue that they should have property rights than those to whom the government simply gave licenses without charge. However, as both will likely be equally situated vis-à-vis the existence of legal property rights, the point may be moot.

[123] Although no broadcasters paid the government for their spectrum licenses, many broadcasters bought their licenses in the secondary market.

[124] FCC Report 10-201, *supra* note 88, at 74-75, para.133.

[125] This is the same point the FCC made in FCC Report 10-201. *See* FCC Report 10-201 *supra* note 88, para. 133.

D. As a Whole, Broadcasters' Argument for Property Rights Based On Traditional Property Law is Very Weak

On balance, broadcasters have a relatively weak argument based on traditional property principles for property rights in their spectrum. Although they may assert that they have property rights based on theories of adverse possession or easement by prior use, their strongest argument for property rights would be based on easement by estoppel. This theory, combined with arguments based on historical FCC administration of the statutes and implied government promises, may support a property rights theory. However, this argument is quite weak because the licenses and the statutes are clear that no such property rights exist, and Supreme Court precedent gives clear deference to statutory text in interpreting similar property claims and is reluctant to grant estoppel claims against the government.

VI. Broadcasters May Have Due Process Rights

Although broadcasters are unlikely to possess property rights in their FCC licenses, they may have due process rights that could considerably complicate FCC attempts to reacquire the spectrum. In *Perry v. Sindermann*,[126] the Supreme Court held that reasonable expectations of property rights can give rise to due process rights. *Sindermann* involved a college teacher who did not have formal tenure rights and was fired. He claimed that there was an informal system that essentially amounted to tenure. The Court ruled that, as there was some reasonable expectation of job security, the teacher was entitled to due process rights to fight his termination. These principles are equally applicable in the broadcasting context. Although they have no formal property interest, the broadcasters' expectations of continued use likely entitle them to some form

[126] Perry v. Sindermann, 408 U.S. 593 (1972).

of due process before they could be stripped of their rights in the middle of a license period. However, as there is no requirement for a "hearing on the record" for FCC license disputes, the due process procedure is likely to be in the form of an informal adjudication, which would somewhat mitigate the administrative burdens on the FCC. Moreover, if a broadcaster's license is simply not renewed at the expiration of the license period in accordance with Congressional legislation, the broadcaster would not likely be found to have due process rights based on the clear text of the law that denies them property rights. However, the broadcaster would have standing under the Administrative Procedures Act[127] to seek judicial review of an FCC decision not to renew its license. This could be a significant administrative challenge for the FCC.

A. Congress Can Help to Simplify the FCC's Process

Congress and the FCC could coordinate efforts to avoid the necessity of the FCC undertaking a rulemaking or adjudication process. Specifically, the FCC might be able to avoid an adjudication and/or rulemaking process if Congress were to simply pass legislation to eliminate the broadcasters' rights upon renewal and reallocate the spectrum for mobile broadband, with or without a payment to the broadcasters. The right to appeal a termination of a benefit by an agency such as the FCC does not apply to Congressional actions. Therefore, the broadcasters' rights would simply terminate under this new legislation. However, if the legislation merely gives discretion to the FCC to create a rulemaking process to determine new uses for the broadcasters' spectrum, the FCC would have to engage in a rule making process. In addition, if the legislation grants the FCC discretion to determine which broadcasters' licenses to terminate, constitutional due

[127] Administrative Procedure Act, 5 U.S.C. § 551 (2006).

process considerations per *Sindermann* would require an adjudication hearing for each termination.

Congress is currently evaluating multiple pieces of proposed legislation[128] that would allow the FCC to conduct "voluntary incentive auctions" that would enable the FCC to auction the spectrum of consenting television broadcasters and share a portion of the proceeds with them. Without such legislation, the FCC has no authority to compensate the broadcasters for their spectrum. The main drawback of the voluntary auction legislation is that some broadcasters using different frequencies in different markets will undoubtedly choose not to participate. Under this scenario, the FCC would reclaim a patchwork of frequencies across the country instead of continuous blocks of nationwide spectrum that nationwide broadband services can efficiently use[129] and/or the FCC might encounter broadcaster "holdouts" and not acquire enough spectrum in certain markets. In order to ensure the FCC would be able to get contiguous blocks of nationwide spectrum, the draft incentive auction legislation would also allow the FCC to force a sale of some non-participating television broadcasters and provide them equitable compensation. The mechanics of the forced sales process varies somewhat in each piece of proposed legislation. Should the legislation move forward, those details are likely to be highly debated by the television broadcasters who are opposed to any involuntary changes to their licenses. But for the relocation of spectrum to be effective, the FCC will undoubtedly need a means for moving some non-participating broadcasters off the

[128] These include provisions in HR 2482; House. Document: 112-53 - The ``American Jobs Act of 2011" Legislative Proposal; and expected provisions in the recommendation of the United States Congress Joint Select Committee on Deficit Reduction - also known as the "super committee." Sam Churchill, *NTIA "Finds" 1.5 GHz of Federal Spectrum,* DAILYWIRELESS.ORG (OCT. 19, 2011 12:18 PM), http://www.dailywireless.org/2011/10/19/ntia-finds-1-5-ghz-of-federal-spectrum/)

[129] Some of the problems associated with non-contiguous spectrum may be mitigated by additional proceedings to "repack" the remaining broadcasters' spectrum.

spectrum. Moreover, the drafts of the incentive auction authorization give the FCC sufficient authority over the details that in order to conduct the auction and force certain necessary sales of broadcasters, the FCC will still need to conduct a rulemaking process.

Despite general universal agreement of the importance of reallocating television broadcast spectrum, politicians generally distance themselves from any action that is unpopular with broadcasters. This is likely because broadcasters have significant flexibility to give sitting politicians airtime for "new" events without violating rules against equal coverage.[130] As a result, most members of Congress are loath to offend broadcasters in their district. If Congress elects to pass legislation that avoids the FCC rulemaking and adjudication process, it is likely to be highly favorable to the broadcasters. Alternatively, legislation will leave many of the contentious details for the FCC to determine in a rulemaking and/or adjudication process.

B. Absent New Legislation, at Least One Rulemaking Process Will be Necessary

As mentioned above, Congress may be unwilling to enact legislation that would enable the FCC to avoid a rulemaking process even if it provides it with the authority to compensate broadcasters for spectrum it reallocates. In fact, political pressures from broadcasters may prevent Congress from acting at all. However, the text of Section 204 of the 1996 Amendment allows the FCC an option for not renewing the broadcasters' licenses and then reassigning the spectrum for use by mobile broadband operators. Thus, the FCC would theoretically be able to make the change itself without new Congressional legislation. Absent such legislation, however, converting television

[130] *Election Coverage and Equal Time,* RADIO TELEVISION DIGITAL NEWS ASSOCIATION, http://www.rtnda.org/pages/media_items/election-coverage-and-equal-time1600.php (last visited Oct. 30, 2011).

broadcast spectrum to use by mobile broadband providers is likely to involve a challenging two-step process. First, the FCC would have to undertake a rulemaking process to determine whether to not renew or terminate the broadcasters' licenses as not being in the public interest. This is because the FCC is cannot simply decide not to renew a license to divert the spectrum for a higher value use as this would be a prohibited comparative use basis (see Section II(C) of this paper for a discussion of the 1996 Amendment to the Telecom Act and the issue of comparative renewal). Second, the FCC would need to conduct a rulemaking process to change the allocation of the newly released spectrum from broadcast to mobile broadband usage.

1. Decision to Not Renew Broadcasting Licenses Likely Needs Rulemaking

Major policy changes, such as not renewing broadcasters' licenses after decades of routinely doing so, generally require government agencies to conduct a rulemaking process. Absent a requirement of a hearing "on the record," the FCC would be able to use an informal rulemaking process to determine the current broadcast use is not in the public interest. Such a process would enable the broadcasters and their supporters to enter comments and data into the record for the FCC to consider. The FCC would be obligated to promulgate its policies using a rational and logical process based on the information in the record. This process would also give the broadcasters ample opportunity to enter their objections into the record. The FCC would be obligated to evaluate the objections objectively by using a rational process. With these requirements, applying an informal process outlined to the FCC's adoption of a new policy regarding spectrum reallocation could take a year or more.

The FCC may have been positioning itself to avoid a rulemaking process with its December 23, 2010, FCC Report 10-201, which implies that current rules allow it to make these changes in license renewal and spectrum usage, even in the middle of a license period. Any such action, however, would be such a significant change from historic practices that the FCC may wish to conduct a rulemaking process to avoid a finding that its decision to take or not renew broadcasters' spectrum is "arbitrary and capricious." Without a rulemaking process, the first broadcaster whose spectrum license is taken could argue that in the literally tens of thousands of prior renewals in more than 70 years of the FCC's existence, all broadcasters had their licenses renewed absent egregious violations of the license terms. This first "deprived" broadcaster could further argue that it was in the same position as the others, and therefore the decision to take its spectrum must have been arbitrary or capricious.

To avoid a tedious rulemaking for a decision not to renew broadcasters' licenses, the FCC could issue a policy statement that gives notice of its new plans to legally reclaim broadcasters' licenses, and the FCC Report 10-201 may give it some room to do that. However, an FCC licensee, especially those who did not pay the government for their license (as is the case with the vast majority of television broadcasters) may be viewed as benefit holders, and changes for policy with respect to benefit holders requires a rulemaking. In the case of *National Family Planning Ass'n, v. Sullivan*,[131] the court held that the U.S. Department of Health and Human Services needed to conduct a rulemaking process when it changed its prior interpretation of a 1988 regulation restricting abortion counseling in Title X programs to permitting it within the doctor-

[131] National Family Planning v. Sullivan, 979 F.2d 227 (D.C. Cir. 1992).

patient relationship. The court quotes Professor Michael Asimow's statement of the maxim of administrative law, "If a second rule repudiates or is irreconcilable with [a prior legislative interpretation], the second rule must be an amendment to the first; and of course, an amendment to a legislative rule must itself be legislative."[132] In the context of the broadcasters' license renewals, this could mean that the longstanding practice of license renewals suggests the FCC will need to engage in a rulemaking process in an effort to ensure any decision to take away or not renew a television broadcaster's license can withstand potential litigation.

Moreover, if the FCC elects to forego a rulemaking process and simply issue a policy statement as it suggests it could do in FCC Report 10-201, judicial review of each individual subsequent adverse adjudication against broadcasters is likely to be held to the intermediate standard for review of agency actions set forth by the Supreme Court in *Chevron*.[133] Under this standard, the court is required to verify if the agency's decision was a "reasonable interpretation." However, if the agency undergoes a rulemaking process, the single rulemaking process will be subject to the *Chevron* standard of deference, but each individual adjudication decision will only be held to the highly deferential *Seminole Rock*[134] standard whereby the court merely asks whether a decision where an agency interprets its own rules was "plainly erroneous." It would likely be much easier for the FCC to manage a single rulemaking on the broadcasters' non-renewal that would be held to the intermediate *Chevron* deference standard than to risk hundreds of appeals that are subject to this standard.

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[132] Michael Asimow, *Nonlegislative Rulemaking and Regulatory Reform*, 1985 DUKE L.J. 381, 396 (YEAR).

[133] *See* Chevron U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837 (1984).

[134] Bowles v. Seminole Rock; 325 U.S. 410 (1945).

2. Rulemaking Still Needed to Reallocate Spectrum

After cancelling or not renewing certain broadcaster's licenses, the FCC would then need to conduct a separate rulemaking to reallocate the spectrum for mobile broadband use. The allowable uses of the spectrum used by the television broadcasters is codified by in regulation 47 C.F.R. § 2.106 as being only for television broadcasting.[135] According to the "Accardi Principle,"[136] agencies must follow their own rules unless they make a new rule. In *Accardi*, the petitioner appealed to the Board of Immigration Appeals to suspend his deportation from the United States and was denied. He challenged the denial on the basis that the attorney general prejudged the denial and prevented him from receiving a fair hearing by the board. The administrative rules of the Immigration and Naturalization Service gave the Board of Immigration Appeals discretion when considering appeals. The Court ruled that the attorney general was required to follow the agency's rules and that discretion by the Board of Immigration Appeals meant that the attorney general should sidestep involvement. In the broadcasting context, the current rule is that the spectrum is to be used by television broadcasters. Absent new Congressional legislation or an FCC rulemaking process overturning this rule, the FCC is bound by it.

[135] *See Table of Frequency Allocations,* FCC, GPO.GOV, http://edocket.access.gpo.gov/cfr_2009/octqtr/pdf/47cfr2.106.pdf (last visited May 15, 2011) (showing a table of spectrum allocations).

[136] Accardi v. Shaughessy, 347 U.S. 260 (1954).

C. Elements of Adjudication Due Process to be Decided

The FCC does not plan to cancel or not renew all television broadcasters' spectrum and reassign it to mobile broadband.[137] Unless the FCC makes a blanket rule about which broadcast licenses not to renew, it will need to individually decide which ones to renew. Even with the proposed incentive auction legislation, the FCC will likely need to determine which television broadcasters to allow in the incentive auction and which ones to force into a sale so that the FCC can reclaim contiguous blocks of nationwide spectrum. If it makes subjective individual decisions regarding each broadcaster, then each broadcaster whose license is taken away is also entitled to an adjudication process. The main considerations of due process with respect to the adjudication are: 1) Whether the broadcasters are entitled to a pre-deprivation process before their license is not renewed or whether they are merely entitled to a post-deprivation appeal; 2) If the broadcasters are entitled to pre-deprivation process, whether they are entitled to an in-person hearing or merely a review process based on written appeals; and 3) If the broadcasters are entitled to an in-person hearing, whether the hearing would include certain procedural elements, including the right to cross examine the government's witnesses.

1. Balancing Test for Extent of Due Process Elements

The requirements for an informal adjudication can still be substantial. In *Mathews v. Eldridge*[138], the Court held that a recipient of Social Security disability benefits was entitled, to some process prior to deprivation of those benefits, absent an emergency situation. The Court established a three part test that balances: 1) the importance of the

[137] The National Broadband Report calls for initially using 120 Mhz of the broadcasters 276 Mhz of spectrum for mobile broadband. *See* Spectrum, *supra* note 7, at Recommendation 5.8.5.

[138] Mathews v. Eldridge, 424 U.S. 319 (1976).

interests at stake; 2) the risk of an erroneous decision; and 3) the interest of the government. The Court also held that the benefits recipient was entitled to an impartial arbitrator. This framework was intended to balance the extent of due process rights with the needs of the government.

2. Application of Balancing Test to Broadcasters

We consider each of the three elements in *Mathews*:

The first, the importance of the interests at stake, is quite high. From the broadcasters' perspective, their licenses are very valuable. They are potentially worth, on average, about $3.5 million each. This is based on an estimated enterprise value of the U.S. television broadcasting industry of $60 billion to $65 billion based on recent estimates of $63.2 billion[139] and $63.7 billion.[140] As about 10% of television viewing occurs over the air, the value of the industry is likely to be approximately 10% of this figure or $6.0 to $6.5 billion. As there are approximately 2200 television licenses (including nearly 500 low power licenses), this equates to an average broadcaster license value of between $2.8. and $3.0 million per license.[141] The significant dollar amounts involved strongly suggest the broadcasters are entitled to meaningful due process.

Second, the risk of error is low, but not insignificant. While it does not seem that the broadcasters have a strong case, there are ambiguities and some potential estoppel arguments, similar to *Sindermann.* The cost of an error is quite high as a broadcaster

[139] Bazelton, *supra* note 112, at 13.

[140] Spectrum, *supra* note 7 at Recommendation 5.85, n.87.

[141] The actual value of a specific license is likely to vary widely depending on the specific geographical location and circumstances of the particular broadcaster. On one hand, the licenses reacquired would be disproportionally located in larger markets where frequency is limited and broadcaster values are higher. On the other hand, the FCC would presumably focus on reacquiring the weakest, and hence the cheapest broadcasters in each market. On balance the industry average of $2.8 to $3.0 million per broadcaster appears to be a reasonable estimate.

whose license is revoked may lose its business. Even if its license were later restored, this would not compensate it for its lost business or its viewers who have lost a source of content in the interim. The risk of error and the need to clarify the broadcasters' rights weigh in favor of a detailed process.

Third, the burden on the government is heavy, but the FCC is a significant government agency able to bear this burden. Give the large potential value to society in reallocating the licenses and the prospect of potentially depriving some broadcasters of a viable business model, it would seem that the government would be able to devote significant resources to addressing the issue. This is especially true as the reallocation of spectrum is a task the government is voluntarily assuming in order to provide greater value to society. This is not the case of a small impoverished government agency that has to deal with a problem that is suddenly thrust upon it wherein a government agency plea for administrative relief might be more convincing.

3. Likely Requirement for Broadcasters' Due Process in Any Adjudication Process

Courts have generally held that people who are deprived of a benefit are owed some due process prior to deprivation. In *Bell v. Burson*[142] the Court ruled that drivers are entitled to an opportunity to present argument before losing their driver's license. Likewise, in *Goldberg v. Kelley*[143] the Court ruled that a person cannot be deprived of welfare benefits without a hearing. However, in *Gilbert v. Holmer*[144] the Court ruled that a policeman who was arrested on drug charges was not owed a hearing before being temporarily transferred to non-police related duties. This series of cases suggests that a

[142] Bell v. Burson, 402 U.S. 535 (1971).

[143] Goldberg v. Kelly, 397 U.S. 254 (1970).

[144] Gilbert v. Holmer, 520 U.S. 924 (1997).

pre-deprivation hearing is generally owed to a person who will be deprived of a benefit unless practical concerns require otherwise. According to this reasoning, the broadcasters are, in all likelihood, due a hearing before their licenses are withdrawn during their license period. The government will not be able to show the type of urgency that existed in *Gilbert*. However, support for a hearing is much weaker if the government, as is widely expected, simply denies renewal at the end of the broadcasters' five-year license periods.

If they are owed a hearing, the broadcasters will likely to have the right to an in-person hearing. In *Cleveland Bd. of Educ. v. Laudermill*[145] the Court ruled that public sector employees were only entitled to tell their side of the story through filing a paper form, later dubbed a "Laudermill Letter," before being fired for failing to disclose a felony conviction. There, the evidence of the felony convictions was strong, resulting in little risk of error. Moreover, in the case of error, the employees could simply be reinstated. Yet, the *Laudermill* criteria do not apply to the broadcasters. If their spectrum is taken away, the broadcasters' businesses may fail, and simply returning it months, or years, later will not compensate them or their viewers. Moreover, the 1934 Act calls for a:

> [F]ull hearing in which the applicant and all other parties in interest shall be permitted to participate. The burden of proceeding with the introduction of evidence and the burden of proof shall be upon the applicant, except that with respect to any issue presented by a petition to deny or a petition to enlarge the issues, such burdens shall be as determined by the Commission.[146]

[145] Cleveland Bd. of Educ. v. Laudermill, 470 U.S. 532 (1985)

[146] 47 U.S.C. § 309(e).

The text does not specifically call for the hearing to be in-person, but the requirement for "the applicant and all other parties" to be "permitted to participate" suggests this is the case. Therefore, broadcasters are likely entitled to due process in the form of an in-person hearing before an impartial judge and a full explanation of the decision before their spectrum rights are taken during the term of their licenses.

It is not clear if the government will owe the broadcasters the right to cross examine the government's witness. On the one hand, the text of the 1934 Act does not call for a "hearing on the record" that would signal a requirement for a formal adjudication with such formal procedures as cross examination of witnesses. Rather, the 1934 Act only requires a "full hearing," signaling that informal adjudication processes that do not require the government to offer the broadcasters these elements of due process would suffice. On the other hand, if there are disputed issues, formal procedures such as cross-examination of witnesses are important to prevent a decision from appearing arbitrary or capricious. In *Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc*.,[147] the Court ruled that courts cannot impose additional requirements on an agency beyond those required to meet the needs standard for an informal rulemaking or adjudication. However, courts can declare the process to be arbitrary or capricious if they determine that the agency did not have appropriate information to make its determination. Allowing cross-examination of witnesses can often flesh out an issue so that it does not appear arbitrary to a reviewing court.

Ultimately, the FCC will have to decide whether granting the opportunity for cross-examination of witnesses as part of a pre-deprivation due process hearing will make

[147] Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc., 435 U.S. 519 (1978).

its decision appear less arbitrary. Cross-examination is time consuming and arguably not necessary because the issues seem straightforward. On the other hand, providing for cross-examination will increase the odds that a reviewing court will uphold the agency's decision. Given the challenges of the adjudication process, the FCC would likely try to avoid this approach and seek a blanket rulemaking formula that does not require individual adjudications. Given the differing spectrum needs in different markets, however, such a "one size fits all" blanket rule may be difficult to develop.

VII. Broadcasters Likely Have Right to Judicial Review of Adverse Decisions

Even if the broadcasters were not afforded due process rights, they would be able to appeal any FCC decision adverse to their individual interests in a judicial proceeding. The broadcasters would not, however, have standing to challenge the actual reallocation of the spectrum. This is so because, once they lose their licenses, the broadcasters do not have an interest in the spectrum. Therefore, they cannot claim any harm from reallocation of their former spectrum licenses.

The broadcasters would, however, have standing to challenge the denial or terms of a forced sale of their individual licenses. This would include an FCC decision to deny the renewal of their licenses or determination of the level of payment in a forced sale that enables the FCC to reclaim blocks of nationwide contiguous spectrum. There are three primary levels on which the television broadcasters could try to fight an FCC decision to take away or not renew their license. The first is to argue that any Congressional legislation was unconstitutional or improperly interpreted. The second is to invalidate any rulemaking process on which the FCC's adverse action is based. The third is for the

individual television broadcasters to attack any adjudication made pursuant to the rule that takes away or does not renew their specific license.

A. Attacking Congressional Legislation

If Congress passes legislation that terminates broadcasters' licenses upon renewal, the broadcasters might argue that the legislation caused an unconstitutional deprivation of property. As Sections II-V of this paper argue, this approach is unlikely to succeed. Alternatively, the broadcasters may argue that the legislation was somehow misread when applied by the FCC. Absent an extraordinary mistake on the part of Congress or the FCC, this approach is also unlikely to succeed. Although the broadcasters are unlikely to prevail on either of these claims, this approach could force the government into a politically charged legal battle. Notwithstanding the fact that any such legislation would likely be upheld, as discussed in Section VI(A), political pressure may make it hard for Congress to act.

B. Routes for Broadcasters to Attack FCC Rulemaking

Assuming the FCC pursues a rulemaking process as opposed to a policy statement or Congressional legislation that eliminates the need for rulemaking, the broadcasters can appeal the subsequent decision to a court. The court would not conduct a *de novo* review. Rather it would review the agency action under the "*Chevron* test" to determine whether: 1) the decision was within the power granted to the agency by Congress; 2) the law was clear; and 3) the agency decision was a reasonable interpretation of the FCC's delegated responsibilities.

1. Did the FCC have the Authority to Make the Rule?

The first question under the *Chevron* test is whether the rulemaking (i.e., the decision to withdraw or not renew the broadcaster's license) is within the FCC's statutory authority. The FCC's charter indicates the agency was formed:

> For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is hereby created a commission to be known as the "Federal Communications Commission", which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this Act.[148]

This charter language clearly gives the FCC authority to regulate the use of electromagnetic spectrum in the U.S. This grant of power, combined with the FCC's long history of regulation in this area and the fact that Congress has not already passed controlling legislation to the contrary, compels the conclusion that the FCC possesses statutory authority to revoke or refuse to renew broadcasting licenses and to regulate the use of spectrum.

2. Was the Law clear?

The second question the court would ask is whether the rulemaking is in violation of the law. As Sections I-V of this paper argue, Courts are likely to find that not renewing broadcaster's licenses is legal based on current U.S. laws as the current underutilization of spectrum is not in the public interest. Likewise, given the sweeping nature of the FCC's charter, as well as its history of regulating spectrum allocation, it is nearly certain

[148] 47 U.S.C. § 151 (1934).

that a court would find the reallocation of spectrum from an underutilized application (television broadcasting) to one that is in greater demand (mobile broadband) to be consistent with the laws governing the FCC. Moreover, neither action would violate Congressional intent because there is no other body or law or regulatory agency overseeing electromagnetic spectrum in the U.S..

3. Was the Rule Permissible?

The third question is whether the rule is a permissible interpretation of the agency's delegated responsibilities. The courts would likely construe an FCC adjudication taking away a broadcaster's license or reallocating its spectrum, pursuant to its own rulemaking, to be an interpretation of its own rules. Thus, the FCC would be given considerable deference to answer these questions. The court would not conduct a *de novo* review of whether the ruling was appropriate. It would, however, review the record to ensure that the agency decision was reasonable and supported by sufficient evidence. Therefore, the FCC would have to compile a substantial record with all of the information underlying its decision, including reports of any advisory committees, expert testimony, comments, and responses thereto. Based on this record, the FCC would need to show that its decision was the result of a rational process and was not "arbitrary and capricious."

The FCC should not have a problem assembling a record that demonstrates that its decisions not to renew broadcaster's licenses and to reallocate television broadcasting spectrum to mobile broadband resulted from a logical processes. It is widely agreed that the television broadcasters' current underutilization of the spectrum is suboptimal and not in the public interest, and that mobile broadband usage would provide more utility to

society. However, given the large number of interested parties and comments, the process of assembling a record to demonstrate that its action resulted from a rational process is likely to be extremely time and resource consuming for the FCC. Moreover, any error in assembling the record could result in court-ordered remedies that further delay the process.

Ultimately, the FCC should be able conduct a rulemaking processes that can withstand court challenges so that it can reallocate the broadcasters' spectrum to mobile broadband. However, it may be a very time and resource intensive process.

C. Routes for Attacking an Adjudication

In addition to appealing the rulemaking process, if there is an adjudication process, any individual adjudication proceedings that resulted in adverse decisions to the broadcasters would be subject to judicial appeal. In adjudication, the FCC would likely be considered to be interpreting its own rulemaking. As such, the reviewing court would likely give the FCC considerable deference under the *Seminole Rock* standard. The *Seminole Rock* standard defers to the agency's interpretation of its own rules unless it is "plainly erroneous" or inconsistent with the regulation. As a result, while the FCC would need to run any adjudication processes carefully, the broadcasters would be unlikely to overturn a reasonable decision based on a rulemaking. Notwithstanding the FCC's likely ability to withstand these challenges, it would face a potential drain on its administrative resources as there would likely be hundreds of these procedures and potentially hundreds of appeals.

As mentioned previously, if the FCC elects to forego a rulemaking process and instead issues a policy statement as it suggests in FCC Report 10-201 that it could do, judicial reviews of adjudications are likely to be held to the lower standard of *Chevron*

deference. This less deferential standard would require determining whether the agency's decision was a "reasonable interpretation" in each individual case. The policy statement approach would give broadcasters significant opportunity to encumber the FCC in protracted judicial appeals of any adjudication that is adverse to the broadcasters. Either way, the FCC risks getting bogged down in lengthy appeals, but its choice to engage in rulemaking versus a policy statement may determine the standard of review of appeals by broadcasters. A rulemaking would require more agency work upfront, but would likely save considerable resources in defending potentially hundreds of appeals. Ideally, from the FCC's perspective, Congress would pass legislation eliminating the need for an FCC rulemaking and adjudications. As mentioned above, this may not happen and therefore would considerably complicate the FCC's situation.

VIII. The Need for a Clear Policy

As explained above, the FCC has taken the position that broadcasting licenses do not confer property rights, even during the license period. This applies equally to broadcasters who were assigned licenses and those who paid significant sums for their licenses. However, in order to revoke and depending on the circumstances, to refuse to renew licenses, the FCC would need to engage in a lengthy and expensive involuntary process against the television broadcasters. Moreover, such action would require the FCC to maintain a delicate balance to avoid devaluing the spectrum rights. To the extent the FCC adopts the position that it can take away spectrum rights before the end of the term, even when the license holder pays for the license, it undermines its ability to maximize the revenue it might receive from re-auctioning the spectrum. Perhaps equally importantly, uncertainty about their license rights may also discourage license holders

from investing in their spectrum and thus deny U.S. residents the very access to advanced mobile broadband service the FCC is trying to encourage. The uncertainty about spectrum license rights would also have similar repercussions for other FCC spectrum licenses, as well as other government licenses including mineral licenses and water use licenses.

In order to maximize its license revenue and investment in the build-out of services, the FCC will need to clearly spell out its policy regarding the rights of spectrum license holders. The lack of a clear policy creates unnecessary uncertainty that lowers the value of the licenses and discourages the very investment in communications services the FCC seeks to encourage.

IX. Conclusion – The Government Needs to Finagle this Round

For the purpose of reallocating television broadcasting spectrum, practical and political reasons suggest that the most expeditious solution is for the government to negotiate a price to buy out the television broadcasters that is more generous than the minimal legal requirements of providing the broadcasters due process. On one hand, it would be difficult for the government to find a legal justification for such a payment without facing legitimate claims of waste of government assets. On the other hand, it would be difficult to maximize the value of future FCC spectrum auctions if the FCC has a policy of depriving licensees of their expected license rights. Perhaps this is why the FCC and Congress have been struggling with the issue for so long, and have indicated that they seek a "voluntary incentive auction" whereby most broadcasters will not be forced to give up their licenses. Instead, they will be encouraged to do so in return for some "carrot" in the form of an, as of yet undisclosed, percentage of the resale of their

spectrum. This payment will need Congressional authorization and likely reflect a discount to the market value of the spectrum to its higher value use for mobile broadband, but perhaps a slight premium to the broadcasters' current use value. The "stick" to encourage broadcasters' participation in the voluntary process is the FCC's argument that it is able to modify the licenses at any time and the implicit threat to take the spectrum away. Given the large economic growth multiplier effects from expanding broadband connectivity, however, the government cannot wait indefinitely. Ultimately, a payment that exceeds any legal requirement may be the most expeditious solution to moving the television broadcasters off the spectrum to make room for the higher value mobile broadband applications, which will ultimately benefit society as a whole.[149] If Congress cannot or will not pass appropriate legislation, the administrative hurdles to reclaiming broadcast television spectrum and auctioning it for higher value mobile broadband use in a timely manner may insurmountable. Therefore, the FCC may simply decide to grant the broadcasters the rights to use their spectrum for higher value mobile broadband applications. Such a decision would be an extremely unfortunate dissipation of government resources by granting the broadcasters an unearned windfall. Going forward, the government will hopefully develop coherent standards for the rights and obligations for spectrum license holders so as to encourage license holders to invest in new services, while maintaining the government's ability to direct use of telecommunications spectrum to its maximum social value.

[149] The FCC recommends that Congress expand its powers to offer various incentive auctions to incumbent licensees largely because "Contentious spectrum proceedings can be time-consuming, sometimes taking many years to resolve, and incurring significant opportunity costs. One way to address this challenge is by motivating existing licensees to voluntarily clear spectrum through incentive auctions." *See Spectrum*, *supra* note 7, at Recommendation 5.4.